

Structure of Entitlements

Madeline Morris

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THE STRUCTURE OF ENTITLEMENTS

Madeline Morris†

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I

INTRODUCTION

Individuals have a variety of interests. A society must decide which of those interests to give legal force. Beth, for instance, has interests in maintaining bodily integrity, discriminating against blacks, and running a cattle farm on her land. The society in which Beth lives might give some legal force to Beth's interests in maintaining bodily integrity and in cattle farming, but none to her interest in discriminating. By giving legal force to an interest, society transforms it from a mere private interest into a legal entitlement.¹

The allocation and construction of legal entitlements is, however, more problematic than that. The various interests to which we wish to give legal force may come into conflict. Beth's interest in cattle farming on her land may conflict with Robert's interest in freedom from noxious odors on his adjoining land, another interest to which we would like to give legal force.² Because any interest to which we would like to give legal force is liable to come into conflict with other interests to which we would also like to give legal force, entitlements must be complex objects. Entitlements must be constructed so that they do more than simply "give legal force" to certain interests. They must also specify the extent and type of legal force that a given interest has in any particular context and in relation to any other particular entitlement.

¹ This Article is concerned specifically with legal entitlements, as distinct from moral entitlements. The Article will discuss legal entitlements under the assumption that they are held by particular identifiable parties. A subsequent article will consider the concepts of group-based and public entitlements.

² Such a conflict was adjudicated in *Spur Industries, Inc. v. Del E. Webb Development Co.*, 494 P.2d 700 (Ariz. 1972).

Because the function of entitlements is complex, their structure is similarly complex. Entitlements are constructed of components. These components can be arranged in a variety of combinations to create various forms of entitlement.³

An important starting point for an analysis of the structure of entitlements is to ask: Why would we want to have various *forms* of entitlement? The brief answer is that no single entitlement form will function beneficially in every legal context. The form of an entitlement shapes the incentives of the affected parties and also determines the distribution of advantages and disadvantages (of wealth, broadly) between parties. No single entitlement form creates optimal incentives and distributions for every kind of social interaction. Rather, in different contexts, different entitlement forms—because of their distinct incentive structures and consequent behavioral effects, and because of their distributive results—promote social goals.

Guido Calabresi and A. Douglas Melamed, recognizing that different entitlement forms are beneficial in different contexts, identified three forms of entitlement: property, liability, and inalienability rules.⁴ They then analyzed the efficiency and distributive implications of each, and gave examples of contexts in which each entitlement form would be valuable.⁵ The recognition that the form of an entitlement can foster or impede goals of efficiency and of distributive justice immediately gives rise to two questions: First, what are all the possible entitlement forms?⁶ And second, what are the efficiency and distributive characteristics of each form?

One approach to identifying the set of possible entitlement forms is first to identify the fundamental components of entitlements, and then to determine the possible combinations of those components, thereby identifying the set of possible entitlement forms. This will be the approach taken in the present Article.

This Article, not surprisingly, does not represent the first attempt to specify the components of entitlements. Writing early this century, W.N. Hohfeld attempted to identify entitlements' fundamental components. Working in a tradition of analytic jurisprudence whose inception is associated with the work of Jeremy

³ Familiar forms of entitlement include, for example, property rules and liability rules. See *infra* Part II.

⁴ See Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability Rules: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1092 (1972).

⁵ *Id.* at 1093-1105.

⁶ Is there an infinite number of distinct forms of entitlement, or is there a finite and identifiable set of forms?

Bentham,⁷ Hohfeld offered a typology of "jural relations." This typology consists of an identification of the rights, privileges, powers, and immunities that, alone or in combination, constitute legal entitlements.⁸ Hohfeld thus attempted to identify entitlements' fundamental components. He did not, however, go on to combine those components to identify the set of possible entitlement forms nor to analyze the efficiency and distributive implications of different forms of entitlement.⁹

In a sense, Hohfeld and, later, Calabresi and Melamed, were approaching the same problem—analyzing the structure of entitlements—from opposite directions. Hohfeld asked what building blocks entitlements are made of, but did not then attempt to put those blocks together to identify the universe of entitlement forms, nor to analyze each form's efficiency and distributive characteristics. Calabresi and Melamed analyzed the characteristics of the three particular entitlement forms they identified (property, liability, and inalienability rules), but did not attempt to determine what other forms of entitlement there might be nor to ascertain what components entitlements are composed of.

The present Article attempts to synthesize and to move beyond the approaches of Hohfeld and of Calabresi and Melamed. First, the Article identifies the basic components of entitlements. (It adopts a different categorization from Hohfeld's for reasons discussed below.)¹⁰ Second, the present Article combines those components to identify the set of entitlement forms rendered by those combinations (as Hohfeld did not attempt to do). Lastly, the Article analyzes the efficiency and distributive characteristics of each entitlement form (as Calabresi and Melamed did, but only for the three entitlement forms they identified).

As discussed below, a full range of entitlement forms is required for a fully effective legal system because different entitlement forms are best suited to foster social goals in different contexts.¹¹ A

⁷ For a comparison of Bentham's and Hohfeld's theories of rights, see H.L.A. HART, *Legal Rights*, in *ESSAYS ON BENTHAM* 162 (1982). For a history of the conception of legal rights in the analytic jurisprudence tradition, see Joseph W. Singer, *The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld*, 1982 WISC. L. REV. 975.

⁸ Wesley N. Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1913). In addition to these four basic entitlement components, Hohfeld also identifies what he calls the "correlatives" and the "opposites" of the four basic components. *Id.* at 30.

⁹ Wesley Hohfeld's untimely death in 1918 cut short the development of his very important work. At the time of his death, Hohfeld was planning the completion of the theory of analytic jurisprudence he had begun in three articles published between 1913 and 1917. See Walter W. Cook, *Hohfeld's Contributions to the Science of Law*, 28 YALE L.J. 721, 722 (1919).

¹⁰ *Infra* Part II.A.

¹¹ *Infra* Part III.

more complete understanding of the possible forms of entitlement and of the characteristics of each form will enhance our ability to structure legal relations in ways that best serve the social goals of efficiency and of justice to which we aspire.

The costs of failing to see clearly the forms of entitlement available in a given context can be high. For example, as will be discussed further in the concluding section of this Article,¹² a failure to consider fully the available forms of entitlement has resulted in unfortunate consequences in the context of fetal protection policies. In 1991, the Supreme Court decided *International Union, UAW v. Johnson Controls, Inc.*¹³ In that case, plaintiffs charged that an employer's "fetal protection" policy excluding all fertile women from jobs involving exposure to substances harmful to fetuses violated Title VII of the Civil Rights Act of 1964.¹⁴ The *Johnson Controls* Court held for the plaintiffs, interpreting Title VII to prohibit female-exclusionary fetal protection policies.¹⁵

But few commentators have been thoroughly satisfied with the *Johnson Controls* decision. Some feminists have observed that the decision, while affording women greater autonomy than a holding for the defendants would have, still leaves women with the burden of fetal protection; it is still women who must either self-exclude from fetal-hazardous jobs, or constrain their reproductive lives in accordance with job conditions, or else risk giving birth to children with disabilities resulting from workplace exposures.¹⁶

Participants in the fetal protection debate have largely adhered to one of two positions: that female-exclusionary fetal protection policies should be permitted or that they should not. The assumption underlying that bipolar split is that equal employment entitlements can be constructed in only one form. As shall be discussed further in Part IV, consideration of a broader range of entitlement forms in which equal employment entitlements could be constructed reveals a range of previously unconsidered resolutions of the workplace fetal protection problem. Before moving to that discussion, however, a framework for analyzing the forms of entitlement must be presented. Presenting that framework will be the main task of this Article.

¹² See *infra* Part IV.

¹³ 111 S. Ct. 1196 (1991).

¹⁴ 42 U.S.C. § 2000e-2 (1988).

¹⁵ *Johnson Controls*, 111 S. Ct. at 1209-10.

¹⁶ See, e.g., Ruth Rosen, *What Feminist Victory in the Court?*, N.Y. TIMES, April 1, 1991, at A17 (beginning a discussion of the *Johnson Controls* decision with the question: "Am I the only feminist less than thrilled at the Supreme Court's decision on March 20 to grant women the right to risk the health of their unborn?").

Part II of this Article identifies what I will argue are the four fundamental components of entitlements. Part III identifies the fourteen entitlement forms rendered by the possible combinations of those four components, and discusses the efficiency and distributive implications of each form. Part IV, in conclusion, considers the merits of the model presented, with particular focus on its potential value for revealing new options in areas of law not traditionally conceptualized in "entitlement" terms. This Part includes a discussion of the benefits of this model in the area of equal employment law and, specifically, in the contexts of fetal protection and affirmative action.

II

THE COMPONENTS OF ENTITLEMENTS

Writing early this century, Wesley N. Hohfeld lamented that the "effort to treat as simple that which is really complex has . . . furnished a serious obstacle to the clear understanding, the orderly statement, and the correct solution of legal problems."¹⁷ To help remedy that lamented state of affairs and to promote clarity and efficacy in legal reasoning, Hohfeld endeavored to find the "common denominators" of all legal entitlements—to identify "the lowest generic conceptions to which any and all 'legal quantities' may be reduced."¹⁸ His work concerned, as he stated, "the basic conceptions of the law,—the legal elements that enter into all types of jural interests."¹⁹ Hohfeld presented what may be viewed as a component-based framework for understanding legal entitlements. The Hohfeldian framework has long been regarded as an important, if not definitive, analysis of the elements of entitlements and, indeed, "has become a staple of academic legal culture."²⁰ As Duncan Kennedy and Frank Michelman observed, "no one today doubts that

¹⁷ Hohfeld, *supra* note 8, at 19.

¹⁸ *Id.* at 59.

¹⁹ *Id.* at 20.

²⁰ Duncan Kennedy & Frank Michelman, *Are Property and Contract Efficient?*, 8 *HOFSTRA L. REV.* 711, 751 (1980). Hohfeld's work has been applied, critiqued, or built upon in a large and diverse range of legal opinions and articles. *See, e.g.*, *Flast v. Cohen*, 392 U.S. 83, 119 n.5 (Harlan, J., dissenting); HART, *supra* note 7; J.M. Balkin, *The Hohfeldian Approach to Law and Semiotics*, 44 U. MIAMI L. REV. 1119 (1990); Walter W. Cook, *The Alienability of Choses in Action*, 29 *HARV. L. REV.* 816 (1916); Cook, *supra* note 9; Arthur L. Corbin, *Legal Analysis and Terminology*, 29 *YALE L.J.* 163 (1919); Lon L. Fuller, *Legal Fictions*, 25 *ILL. L. REV.* 363 (1930); Andrew Halpin, *More Comments on Rights and Claims*, 10 *LAW & PHIL.* 271 (1991); Singer, *supra* note 7; Glanville Williams, *The Concept of Legal Liberty*, in *ESSAYS IN LEGAL PHILOSOPHY* 121 (R. Summers ed., 1968); Lars Lindahl, Stig Kanger's Theory of Rights, presented at the Stig Kanger Memorial Symposium on the Logic of Rights and Choices of the 9th International Congress of Logic, Methodology and Philosophy of Science in Uppsala, Sweden (unpublished manuscript, on file with the Cornell Law Review).

[Hohfeld's] list of entities is both an exhaustive and an elementary vocabulary for *modes* of entitlement."²¹ After delineating the Hohfeldian framework, the present Article offers an alternative component-based model of the structure of entitlements that diverges somewhat from the Hohfeldian framework and which, I will argue, is preferable for practical and analytic purposes.

Hohfeld presented the following framework of "jural relations" that, he maintained, captured the fundamental elements of legal relations:

Jural	{ right	privilege	power	immunity
Correlatives	{ duty	no-right	liability	disability
Jural	{ right	privilege	power	immunity
Opposites	{ no-right	duty	disability	liability ²²

By a "right," Hohfeld means, specifically, a claim against another party that that other party must perform some act (or forbearance) owed to the right-holder. Thus, Hohfeld maintains, a right is necessarily the correlative of a duty. To have a particular right means precisely that the relevant other party has a corresponding particular duty. For instance, that I have a right to the sole use of my land means that you have a corresponding duty not to trespass on my land. The *opposite* of a right, in Hohfeld's scheme, is a no-right, that is, the absence of a duty on the part of the other party.

This concept of the absence of duty leads to Hohfeld's next set of jural correlatives and opposites. To have no jural duty (no duty to do or to forbear from doing any particular thing) is to have a privilege. To have a privilege means that one is at liberty to do the act in question. For example, if I have a privilege to walk on my land, then I have no legal duty to refrain from walking on my land. A privilege is, thus, the jural opposite of a duty.

The correlative of my privilege is that you have no-right against me that I should not do as I wish in the relevant regard. This no-right correlative of my privilege, Hohfeld notes, does *not* mean that you have a duty not to interfere with the exercise of my privilege. For instance, if I have merely a privilege but no *right* to walk on my land, then you have no duty not to interfere with my walking. Rather, my privilege, being the correlative of your no-right, means simply that you have no-right to take *legal* action—you have no *legal* claim against me—regarding my privileged action or forbearance. Were I to have, beyond my mere privilege to walk on my land, also a legal claim that you should not interfere with my walking, then I

²¹ Kennedy & Michelman, *supra* note 20, at 757 (emphasis in original).

²² Hohfeld, *supra* note 8, at 30.

would have both a privilege (to walk) and a right (corresponding to your duty of non-interference).

The next two of Hohfeld's sets of jural correlatives and opposites relate to the structures governing transfers of entitlements between parties. With regard to jural "powers," Hohfeld states: "[T]he person (or persons) whose volitional control is paramount may be said to have the (legal) power to effect [a] particular change of legal relations"²³ When the government condemns my house in eminent domain, for example, it exercises a Hohfeldian "power" by forcing a sale (a compensated transfer) of the entitlement to my house. The government thereby forces a change in my legal relations with the government vis-a-vis that house. Hohfeld adds that "a power is one's affirmative 'control' over a given legal relation as against another"²⁴ To have a jural power, then, according to Hohfeld, is to have paramount power to decide whether to effectuate a given change in one's legal relations with another party.

The correlative of a power, Hohfeld maintains, is a liability. If the government has the power, in eminent domain, to alter our legal relations by purchasing my house without my consent, then I have, to that extent, a liability. The opposite of a jural power is, in Hohfeld's terms, a disability; I am disabled from affecting our legal relations if I have no power to do so. While the government holds the power to force a sale of my house, I, holding no converse power, am under a disability to compel a sale of my house to the government.

Hohfeld's final pair of jural correlatives is immunities and disabilities. If I am *not* empowered to change our legal relations—that is, if I am under a disability—then you are immune from my changing our legal relations. Since I cannot force a sale of my house to the government, the government holds an immunity. Thus, the government's immunity is correlative to my disability. Immunity is, in that way, the opposite of liability. The government's immunity means that I cannot change our legal relations, the opposite of what would obtain if the government were under a liability.

Hohfeld's framework of jural correlatives and opposites is a valuable structure for analyzing entitlements. Nevertheless, because of the absence of certain crucial distinctions within the model, the Hohfeldian framework cannot adequately account for all the forms of entitlement that courts and other legal decisionmakers can and do use. For that reason, the present Article constructs a framework

²³ *Id.* at 44.

²⁴ *Id.* at 55.

of entitlement components that diverges somewhat from the Hohfeldian model.

When one constructs a framework for analyzing the structure of entitlements, distinctions must be drawn between different elements of legal relations. The decision of which distinctions to emphasize—to elevate to the status of “entitlement components”—must turn on the significance of each distinction to the structure of legal relations. It would not be inaccurate to analyze legal entitlements merely by saying that every entitlement is a legal advantage of some kind.²⁵ But that “analysis” of legal entitlements would not be very useful. Further distinctions—distinctions among the *kinds* of legal advantages—would have to be drawn and categories created before an analysis of entitlements would be illuminating or instructive. As Andrew Halpin has noted:

[I]t is of importance . . . to recognise the different kinds of legal rights. For else the ambiguity of some vague general sense of a right, albeit capable of spreading comprehensively over every instance of a legal right, will confuse one legal position with another, and will promote dispute at law at the very point where the law should curtail dispute²⁶

Thus, accuracy is a necessary, but not sufficient, attribute of a valuable framework for analysis of entitlements. A valuable model must not only be accurate but, also, precise. It must allow us to draw a set of fundamental distinctions among different forms of entitlement that highlight the significant differences.²⁷

The determination that a particular distinction between types of legal advantages is “fundamental” must rest on an evaluation of the *significance* of the distinction for the structure of legal relations. Therefore, the decision of which distinct types of legal advantages

²⁵ As H.L.A. Hart has observed in a related context, “[s]uch a general formula is suggested by Hohfeld’s statement that the generic sense of a right means ‘any legal advantage’.” HART, *supra* note 7, at 193 (citation omitted).

²⁶ Halpin, *supra* note 20, at 298-99.

²⁷ See *supra* note 18 and accompanying text. Hohfeld described his project as identifying “the lowest generic conceptions to which any and all ‘legal quantities’ may be reduced.” Hohfeld, *supra* note 8, at 59. Hohfeld described his four sets of correlatives as “the lowest common denominators of the law.” *Id.* at 58. But, in fact, the four sets of correlatives are not the lowest “generic conceptions” or “common denominators” of the law. Lower generic conceptions would be, for instance, the conceptions of “legal advantage”—within which would fall Hohfeldian rights, privileges, powers and immunities—and of “legal disadvantage”—which would subsume Hohfeldian duties, no-rights, liabilities, and disabilities. It is more appropriate, then, to describe Hohfeld’s project as a search, not for the lowest generic conceptions of the law but, rather, for the fundamental distinctions between types of legal advantages. Thus, the most desirable framework for analyzing entitlements has not the fewest or most “generic” components but, rather, has the most significant and useful components highlighting the crucial distinctions among legal forms.

to elevate to the status of entitlement components is driven not by logical necessity, but rather by a qualitative evaluation of the analytic and practical utility of the various possible distinctions. The decision in the present Article to diverge from the Hohfeldian model in the ways discussed below is based upon just such a qualitative evaluation of analytic and practical utility.

A. The In-Kind Enjoyment Component: Diverging from Hohfeld's Right/Privilege Distinction

The Hohfeldian framework of jural relations distinguishes between rights and privileges as distinct elements of entitlements. We can use the example of a parking garage to work through this distinction. The parking garage in my office building sells both general and reserved-space monthly parking passes. A general pass allows its holder to enter the garage, search for a parking space, and park in it—unless the garage is full, in which case the general pass holder will have to wait for a space. The reserved-space pass, by contrast, allows its holder to park in a particular parking space and prohibits all others from parking in that space.

Suppose that I like to park in parking space X because it is closest to my office. If I have a reserved-space pass to parking space X, then I have a Hohfeldian right to that space; you have a corresponding duty not to park in that space. If, on the other hand, I have a general monthly parking pass, then I have a Hohfeldian *privilege* to park in space X; I may park in space X if it is empty, but I am not guaranteed access to it—when I arrive, you may have already parked in space X, since you have no duty to refrain from (and, indeed, have the privilege of) parking there.

Thus, when I have a Hohfeldian right, I have a right to enjoy the object of that entitlement (parking space X) in a way that involves your having a corresponding duty (your duty not to park in parking space X). By contrast, when I have a Hohfeldian privilege, I have the privilege to enjoy or attempt to enjoy the object of that entitlement (parking space X), but without your having any corresponding duty (you have no duty to refrain from parking in that space).

Hohfeld notes that a duty is the opposite of a privilege. Your duty not to park in space X is the opposite of a privilege to park in the space. Hence, the absence of a privilege (to park there) constitutes the presence of a duty (not to park there). And, conversely, the absence of a duty (not to park there) constitutes the presence of a privilege (to park there). Therefore, my having a Hohfeldian right (to park in my reserved space X) means that you have no corresponding privilege (to park in that space), while my having a

Hohfeldian privilege (to park in that space) would mean that you *do* have a corresponding privilege (to park there). The difference between Hohfeldian rights and privileges thus turns on whether the other party holds a privilege. If the other party has a privilege, then I possess only a privilege. If the other party has *no* privilege but, rather, a duty, then what I have is a right.

This clarification about Hohfeld's right/privilege distinction permits a further observation: Hohfeldian rights and privileges are both grants of legally-sanctioned access to in-kind enjoyment—to use—of the object of the entitlement (the parking space). The difference between rights and privileges is a difference in the *extent* of legally-sanctioned access to in-kind enjoyment. My right to parking space *X* represents legally-sanctioned access to in-kind enjoyment, or use, of space *X*, including a guarantee that space *X* will be available. When I have a privilege to space *X*, I am granted legally-sanctioned access to in-kind enjoyment of space *X*, but with no guarantee that space *X* will be available. The substance of both the right and the privilege is the grant of legally-sanctioned access to the parking space. The right is a more robust grant of access that involves a corresponding duty, while the privilege is a more qualified grant because the other party's corresponding privilege may interfere with my full in-kind enjoyment.²⁸ But the *domain* in question, the *element* of legal relations, in both cases is in-kind enjoyment of the object of the entitlement (that is, access to use of the parking space). Thus, Hohfeldian rights and privileges both are types of legally sanctioned access to in-kind enjoyment of the object of the entitlement.

The element of legal relations that both rights and privileges allocate is the element of in-kind enjoyment; both rights and privileges constitute grants of access to in-kind enjoyment. Thus, the right/privilege distinction is not a distinction crucial to the *structure* of entitlements; both rights and privileges allocate legally sanctioned access to in-kind enjoyment of the object of the entitlement. The right/privilege distinction relates to the extent of that access to in-kind enjoyment rather than to some distinct structural element of entitlements.

For this reason, I will identify one component, "in-kind enjoyment," rather than Hohfeld's two, rights and privileges, to define

²⁸ One benefit that a right but not a privilege may confer is the ability to exclude others. If I have a duty (corresponding to your right) to keep out of your parking space, then your right to the space includes the ability to exclude others. A privilege, by contrast, could never include the ability to exclude others, since privileges imply no corresponding duties. The ability to exclude others is, thus, one form of in-kind enjoyment that might be included in a more robust grant of access to in-kind enjoyment but omitted from a more qualified grant.

this realm. I will define the in-kind enjoyment component as: legally sanctioned access to in-kind enjoyment or use of the object of the entitlement.

Of course, the in-kind enjoyment component may be divided into subvariables that would reflect whether the entitlement holder holds the in-kind enjoyment component in a more robust or more qualified form.²⁹ The Hohfeldian right/privilege distinction would be one such category of subvariable within the in-kind enjoyment component defining the extent of access to in-kind enjoyment. The right/privilege distinction thus appears to be properly treated as a way of describing the *contents* or *extent* of particular in-kind enjoyment components rather than as reflecting a fundamental difference between two distinct components of entitlements.³⁰

B. The Initiation Choice and Veto Power Components: Diverging from Hohfeldian Powers and Immunities

As discussed above, Hohfeld used the terms "right" and "privilege" to define the realm of in-kind enjoyment of the object of an entitlement.³¹ To define the realm of control over *transfer* of entitlements, Hohfeld employed the terms "power" and "immunity." To have a Hohfeldian power, you will recall, is to have definitive control over whether to effectuate any particular change in one's legal relations with another party. To have immunity means, in Hohfeld's

²⁹ Susan Rose-Ackerman has categorized varieties of qualification on in-kind use of the object of one's entitlement. She states:

[E]ntitlement holders may face restrictions on the use of their property that are designed to produce some benefit or prevent some undesirable activity. We must distinguish between activities that are permitted, required, or forbidden . . .

Case (1) is one extreme: nothing can be done with the entitlement. In fact, in such a situation it seems odd to speak of entitlements at all. Case (2) is the opposite extreme: everything is permitted and nothing is required. Case (3) is somewhat more restrictive: everything is permitted so long as some required activities are carried out (e.g., a historic building preservation law). Under (4), some activities are forbidden but nothing is required (e.g., a zoning law). In (5), those who wish to retain title are required to perform certain activities, which are also the only activities permitted (e.g., a homestead law). In (6), a proper subset of the permitted activities is also required while other activities are forbidden (e.g., a zoning law in a community that also regulates historic buildings).

Susan Rose-Ackerman, *Inalienability and the Theory of Property Rights*, 85 COLUM. L. REV. 931, 934-35 (1985) (footnotes omitted).

³⁰ Again, the decision of which distinctions between types of legal advantages to emphasize as "entitlement components" is driven not by logical necessity but by a qualitative evaluation of the analytic and practical utility of the various possible distinctions. See *supra* notes 25-27 and accompanying text. The decision to treat the right/privilege distinction as a subvariable is made on the basis of those criteria of analytic and practical utility.

³¹ See *supra* Part II.A, at 410-412.

terms, that the other party *cannot* effectuate a change in your legal relations. In other words, the other party holds no power. Hohfeld's power/immunity model does not capture all of the critical information defining the transfer-control realm of an entitlement. After showing why this is so, I will offer an alternative model.

That a party holds a Hohfeldian power does not reveal much about what that party has power to do. We know that he or she can "effect the particular change of legal relations that is involved in the problem,"³² but we do not know what *sorts* of changes in legal relations she has the ability to effect in any instance. The power involved might be merely the power of abandoning her property—say, her football—and thereby changing her legal relations with you vis-a-vis that football. Or, the power at issue might be her power to make an offer of sale of her football to you, thereby empowering you to force a compensated transfer—a sale of her football—during the period of her offer. Or the power involved might even be your power to force the compensated transfer—the sale of the football—in question. Thus, to say that a party holds a Hohfeldian power informs us only that the party has *some* ability of *some* kind to affect the parties' legal relations. It tells us nothing more.

Significant differences exist between the various sorts of "powers." The power to force a transfer of the in-kind enjoyment component of an entitlement (say, in-kind enjoyment of my football), for example, is significantly different from the power to *confer* power to force such a transfer (by, for instance, your offering to buy my football, thereby conferring upon me the power to force a sale during the period of your offer). One way to understand the difference between kinds of Hohfeldian powers is to distinguish between first-order and second-order transfer-control powers. First-order powers are powers to control the disposition (including transfer) of the in-kind enjoyment component,³³ that is, to control who can do what with the object of the entitlement (who can use my football). Second-order transfer-control powers are powers to control the posture of the first-order transfer-control powers (for example, to make offers to buy or to sell in-kind use of my football). A fully useful model for analyzing the structure of entitlements should readily distinguish between such first- and second-order powers.

Like the Hohfeldian concept of powers, the Hohfeldian immunities conception is so broad as to be of only limited analytic value. Knowing that a particular party holds a Hohfeldian immunity

³² Hohfeld, *supra* note 8, at 44.

³³ As shall be discussed below, first order powers would also include powers to control the disposition of the "monetary compensation component," which shall be defined shortly. See *infra* note 36 and accompanying text.

reveals little about the relations between the parties. We know, when we are told that one party holds an immunity, that there is some sort of power that the other party does not hold. But we do not know what the immunity (and correlative lack of power) refers to—nor even whether it is a first or second order immunity.

For these reasons, the Hohfeldian “powers and immunities” framework for the transfer control realm is not specific enough to distinguish between the various transfer control arrangements possible in entitlement forms. To know that Party *A* has a power (or, conversely, that Party *B* has no immunity) is to know practically nothing about the parties’ legal relations. What *would* be informative would be to know which parties hold what I will call the “initiation choice” and “veto power” components.

I will define the initiation choice component as power to initiate or refrain from initiating transfer of the in-kind enjoyment component (say, in-kind enjoyment of my football) from its initial holder to the other party. To initiate a transfer is to make an offer of, or a request for, transfer. The most common form of transfer initiation is the offer to sell or to purchase. I will define the veto power component as the power to refuse a transfer of the in-kind component that has been initiated. For instance, when you offer to rent or buy my football, and I hold veto power, I may decide whether or not to transfer in-kind use in return for compensation as you have offered.

Once we know which parties hold initiation choice and which hold veto power, we immediately grasp a complete understanding of the parties’ transfer control relations. We immediately know who holds what degree of control over whether a particular change in legal relations will occur.

Let us take a familiar form of entitlement, customarily called a “property rule,” as an example. Under a property rule, a party who so desires may offer to buy the object of the entitlement from the entitlement holder. The entitlement holder in turn may accept that offer and sell the object of the entitlement or may decline the offer for any reason.³⁴ A property rule is the type of entitlement form that would apply if, for example, you wished to purchase my football. The sale would occur only if I consented to sell the football to you at the price offered.

To describe the transfer control realm of a property rule in Hohfeldian terms, one would say that both parties hold certain powers and both parties hold certain immunities. Since that description would be unilluminating, we would go on to add that, with regard to the powers held, each party holds initiation choice—that is, each can

³⁴ See Calabresi & Melamed, *supra* note 4, at 1092.

make an offer for a compensated transfer, thereby conferring on the other the power to force a compensated transfer. And we would add that, with regard to immunities, each party holds a veto power—the power to refuse the transfer. In other words, to make the powers and immunities description useful, the additional information required would be, precisely, the allocation of initiation choice and veto power. That additional information would delineate who holds what forms of first-order transfer control (control over whether there will be a transfer of the in-kind component) and also would communicate who holds what forms of second-order transfer control (control over the extent of first order control held by the other party). Staying with the property rule example, knowing that you and I each hold veto power and initiation choice, we know that, since either of us can veto transfer, no forced transfer of the in-kind component may occur on the first-order level. We also know that each of us holds the second-order power to confer upon the other the power to force a transfer; you or I would confer that power to the other by making an offer of purchase or sale, that is, by initiating transfer.

The problem with the Hohfeldian powers and immunities description of the transfer control realm is not that it is inaccurate (quite the reverse, it is perfectly accurate). Rather, the problem with the Hohfeldian description is that it is unhelpful. That each party holds certain powers and immunities is true under virtually all entitlement forms. But knowing that each party holds certain powers and immunities is scarcely informative about the structure of the parties' transfer control relations. The Hohfeldian powers and immunities framework does not entail sufficient specificity to convey the minimally necessary information to distinguish one transfer control arrangement from another. The initiation choice/veto power structure conveys that minimally necessary information.

Transfer control arrangements govern changes of legal relations. Initiation choice and veto power, respectively, are the start and stop controls on such changes. The initiation choice/veto power structure conveys the minimal information needed to distinguish between different transfer control arrangements precisely because initiation choice and veto power—the start and stop controls on change—are the essential dimensions of transfer control.³⁵

³⁵ The two aspects of transfer control, initiation choice and veto power, *interact* to shape the transfer control arrangement of an entitlement form. Veto power, for instance, is relevant only if the other party has initiation power. If one party cannot initiate a transfer, then the other will have no use for veto power. And the implications of one party's initiation choice are entirely dependant upon whether the other party holds veto power: Where I hold the only veto power, my initiating a transfer means that I will actually effectuate a transfer—since you hold no veto power. Similarly, where neither

In sum, only when the posture of the two aspects of transfer control—initiation choice and veto power—is known, are the transfer control arrangements of any given entitlement form defined. For that reason, the initiation choice/veto power framework for analyzing transfer control arrangements permits clear analysis of entitlement forms in a way that the Hohfeldian powers and immunities framework does not.

C. The Monetary Compensation Component: A Dimension Not Reflected in the Hohfeldian Framework

In addition to the realms of in-kind enjoyment and transfer control, which Hohfeld's framework addresses, there is another crucial aspect of the structure of entitlements that Hohfeld does not address at all. This missing element is the realm of monetary compensation.

Certain fundamentally distinct entitlement forms are distinguished from each other only by their different structures governing monetary compensation for transfer of in-kind enjoyment. For example, under the property rule entitlement form, discussed above, I may grant or veto your request for in-kind use of my football, and I am further entitled to receive monetary compensation from you in exchange for transferring in-kind use of the ball to you. I may, for example, rent or sell my football to you. By contrast, if you desired in-kind enjoyment of not my football but, rather, my sexual favors, then, while I could freely grant or veto your request as I wished, what I would *not* be permitted to do would be to accept monetary compensation in exchange for in-kind enjoyment. The same analysis would apply if you desired in-kind use of my kidney, that is, if you were requesting that I act as a donor for a kidney transplant. I could grant or decline your request for transfer of in-kind use of my kidney, but I could not (in most states) accept monetary compensation in return for the transfer. Rather than a property rule entitlement form as would govern sale to you of my football, a market inalienability entitlement form, (discussed further below), which allows gifts

you nor I hold veto power, my initiating a transfer means that I will actually effectuate the transfer (since you hold no veto). By contrast, where you and I both hold veto power, my initiating a transfer means that I have conferred upon you the power to force a transfer (i.e., I have made an offer, I have initiated a transfer subject to your veto). Finally, where you hold the only veto power, my initiating a transfer—in effect, making an offer to transfer—makes little difference since you at all times have available to you the option of forcing a transfer, since I have no veto power. Thus, the implications of one party's holding initiation choice depend on which of the parties hold veto power. Overall, then, the shape of the transfer control arrangements of a given entitlement form is a function of the combined postures of the initiation choice and veto power components.

but not sales, would govern grants of sexual access or of bodily organs.

The difference between the property rule and the market inalienability rule entitlement forms is in their treatment of monetary compensation. Under both entitlement forms you may request (initiate transfer of) in-kind enjoyment, and I may grant or veto transfer to you of that in-kind component. The difference between the two entitlement forms is that, under the property rule, I may receive monetary compensation for transfer of in-kind enjoyment while, under the market inalienability form, I may not. In addition to the property and market inalienability entitlement forms, other distinct entitlement forms, discussed below, also are distinguished only by their different monetary compensation structures.

Because the forms of legal relations between parties are largely defined by the structures governing monetary compensation, a framework for analyzing entitlement forms must include a monetary compensation component if it is to render a meaningful analysis or description of the various possible forms of entitlement. I will define the monetary compensation component as: a right to monetary compensation for transfer of the in-kind enjoyment component. The Hohfeldian framework does not identify a monetary compensation component.³⁶ Because it does not, the Hohfeldian framework cannot distinguish between entitlement forms that differ only on the compensation dimension.

D. The Four Component Model

The present Article presents a four-component model of the structure of entitlements that, I suggest, is of greater practical and analytic utility than the Hohfeldian framework from which it diverges. To summarize, the present Article defines the in-kind enjoyment component as legally sanctioned access to in-kind enjoyment or use of the object of the entitlement. For instance, as part of the entitlement to my house, I am entitled to occupy it. The initiation choice component is defined as the power to initiate or refrain from initiating transfer of the in-kind enjoyment component from its original holder to the conflicting party. To initiate a transfer is to make an offer of, or a request for, transfer. A common form of transfer

³⁶ I should say that Hohfeld's model does not *specifically* account for the monetary compensation component. Of course, being entitled to monetary compensation constitutes a Hohfeldian right, and owing monetary compensation constitutes a Hohfeldian duty. Again, then, the problem is not that the Hohfeldian model is inaccurate but, rather, that it is not *specific* enough to analyze entitlement forms adequately. The reason for the Hohfeldian framework's inability to distinguish between entitlement forms that differ only on the monetary compensation dimension is Hohfeld's failure to distinguish between two distinct *kinds* of rights: in-kind rights and monetary compensation rights.

initiation is the offer to sell or to purchase. The veto power component is defined as the power to refuse a transfer of the in-kind component that has been initiated. For example, when you offer to rent or buy my house, I may transfer in-kind use to you as you have requested or I may refuse the transfer. The monetary compensation component is defined as the right to monetary compensation for transfer of the in-kind enjoyment component. I am entitled, for instance, to require payment from you if I rent or sell you my house. By defining the four entitlement components of in-kind enjoyment, initiation choice, veto power, and monetary compensation, the four-component model of this article allows for an analytically sound and pragmatically useful analysis of the forms of entitlement.³⁷

Before moving on to examine the forms of entitlement to which the four-component model gives rise, one preliminary note is in order. Within the four entitlement components inhere subvariables that determine whether a party holds the entitlement component in question in a full or qualified form. As mentioned earlier, for instance, in-kind enjoyment may be qualified.³⁸ My in-kind enjoyment of parking space *X* may be limited by your privilege of parking in space *X* if you happen to get there first. Or my in-kind enjoyment of my stereo may be qualified by a requirement that I not play it so loudly as to disturb my neighbors. Similarly, while the fullest form of initiation choice would include both the power to initiate and the power to refrain from initiating a transfer of the in-kind component, initiation choice could be limited on one of those dimensions. For instance, where transfer of the in-kind component is prohibited, one may not initiate a transfer. An example of a non-transferable in-kind component is one's right to vote in a federal election.³⁹ Conversely, where transfer is *required*, one must, in some circumstances, initiate a transfer. Examples of such circumstances will be discussed below.⁴⁰

³⁷ The four entitlement components presented—in-kind enjoyment, initiation choice, veto power, and monetary compensation—encompass the primary interests associated with legal entitlements. The posture of the in-kind enjoyment component defines what use the entitlement holder may make of the object of the entitlement. Where possible transfer of the in-kind enjoyment component is contemplated, the posture of the initiation choice, veto power, and monetary compensation components becomes relevant. I do not argue, however, that this four-component approach to analyzing entitlements is the only approach possible or the sole one demanded by logical necessity. Rather, the four-component model represents one perspective, only “one view of the Cathedral.” Calabresi & Melamed, *supra* note 4, at 1089 n.2 (“As Professor Harry Wellington is fond of saying about many discussions of law, this article is meant to be only *one* of Monet’s paintings of the Cathedral at Rouen. To understand the Cathedral one must see all of them.” (citation omitted)).

³⁸ See *supra* text accompanying note 29.

³⁹ See *infra* note 49 and accompanying text.

⁴⁰ See *infra* text accompanying notes 99-102.

Regarding qualification of the veto power component, the fullest form of veto power would allow its holder to veto or to refrain from vetoing transfer at his or her discretion. But where transfer is prohibited, one may be required to veto any transfers that are initiated. For instance, if someone offers to sell me his or her vote, I must veto the transaction.

Like the other entitlement components, the monetary compensation component may be extinguished entirely or held in a full or qualified form. Where the monetary compensation component is extinguished, the in-kind holder may not accept compensation for transferring in-kind use (she may give away but may not sell the in-kind component, as is generally the case with human organs).⁴¹ Or, rather than being extinguished entirely, the monetary compensation component may be qualified such that the in-kind holder *must* receive compensation for transferring the in-kind component. Such a qualification would constitute a no-gift constraint whereby the entitled party may sell in-kind use but may not give it away. Such no-gift constraints generally protect third-party interests in contexts such as bankruptcy, where the no-gift rule protects creditors against depletion of the debtor's assets.⁴² Or the monetary compensation component may be qualified such that the in-kind holder may transfer in-kind use only in exchange for a minimum compensation price set by a court. Such minimum-price constraints also are frequently used in the bankruptcy context.⁴³

For most purposes, the four entitlement components—in-kind use, initiation choice, veto power, and monetary compensation—suffice to describe the construction of entitlements. However, we should remain aware that the foregoing subvariables within those four components may modify the entitlement forms created by the combinations of the four components. This Article will focus on the four components, and will address the subvariables as they arise within the discussion.

III

THE FORMS OF ENTITLEMENT

Having identified the four components of entitlements, we can now proceed to consider the forms of entitlement created by combining those components. As a starting point, this Article will analyze, in terms of the four components, the three entitlement forms identified by Calabresi and Melamed.

⁴¹ See *infra* text accompanying note 142.

⁴² See *infra* note 108.

⁴³ See *infra* note 108.

Calabresi and Melamed, in their germinal article, present a schema of three entitlement forms: property rules, liability rules, and inalienability rules.⁴⁴ The property rule was discussed briefly above.⁴⁵ As Calabresi and Melamed put it, "[a]n entitlement is protected by a property rule to the extent that someone who wishes to remove the entitlement from its holder must buy it from him in a voluntary transaction in which the value of the entitlement is agreed upon by the seller."⁴⁶ A property rule would apply if you wished to purchase my house. The sale would occur only if I consented to sell the house at the price you offered.

Calabresi and Melamed's second entitlement form is the liability rule. This rule allows a non-entitled party to purchase an entitlement from its holder at a price set by a court even without the consent of the entitlement holder. As stated by Calabresi and Melamed, "[w]henver someone may destroy the initial entitlement if he is willing to pay an objectively determined value for it, an entitlement is protected by a liability rule."⁴⁷ A liability rule would apply if the government wished to purchase my house under its eminent domain power. The government could purchase my house at a price set by a court, even without my consent.

In contrast to the property and liability rules, Calabresi and Melamed's third entitlement form, the inalienability rule, does not entail the possibility that the entitlement will be transferred to the non-entitled party. The inalienability rule prohibits the entitlement-holder from selling or giving away the entitlement. As expressed by Calabresi and Melamed, "[a]n entitlement is inalienable to the extent that its transfer is not permitted between a willing buyer and a willing seller."⁴⁸ An example of an inalienable entitlement is the right to vote. I may neither sell my vote nor give it away.⁴⁹

⁴⁴ Calabresi & Melamed, *supra* note 4, at 1089. I will use the terms "form of entitlement" and "entitlement rule" interchangeably. Although the term "form of entitlement" more precisely conveys the intended meaning, the use of two terms for the one concept is necessitated by the fact that, since Calabresi and Melamed referred to the forms of entitlement that they identified as entitlement "rules," that terminology has come into common usage.

⁴⁵ See *supra* Part II.B, at 414-416.

⁴⁶ Calabresi & Melamed, *supra* note 4, at 1092.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ See 18 U.S.C. § 597 (1988).

Actually, Calabresi and Melamed do not state whether the inalienability rule they describe is a rule prohibiting all transfers or only compensated transfers (sales). Their use of both the examples of selling one's kidney and of selling oneself into slavery, Calabresi & Melamed, *supra* note 4, at 1112, suggests that they do not distinguish between what one generally may give away but not sell (one's kidney) and what one may neither give away nor sell (oneself into slavery). The present article will use the term "Full Inalienability rule" to refer to a rule prohibiting both sales and gifts. See *infra* notes 131-

Before analyzing the combinations of entitlement components that constitute Calabresi and Melamed's three entitlement forms, a conceptual clarification is in order. Calabresi and Melamed discuss the three entitlement rules they present as three ways of protecting entitlements and of defining their transferability. However, Calabresi and Melamed's three entitlement rules are not, in fact, three ways of protecting and defining the transferability of one *general* kind of entitlement. Rather, Calabresi and Melamed's three entitlement rules actually define three entirely distinct *kinds* of entitlements—three distinct entitlement *forms*.

Under Calabresi and Melamed's conception, a legal system first allocates an entitlement to a party and then selects the kinds of protection and transferability options—property rule, liability rule, or inalienability rule—to afford that entitlement.⁵⁰ Conceiving of a liability rule as a kind of *protection* for an entitlement raises the question whether a rule that allows the *non*-entitled party to force a transfer of an entitlement—even a compensated transfer—without the consent of the entitlement holder can be said fully to “protect” that entitlement. If an entitlement is understood to entail autonomy to decide the disposition of the entitlement (e.g., part of my property right in my house is the autonomy to decide whether or not I am willing to sell the house), then compensation for transfer without the consent of the entitlement-holder can never be said fully to protect the entitlement.⁵¹

A similar point may be made about inalienable entitlements. If a liability rule less than fully protects or honors an entitlement because it deprives the entitlement holder of the autonomy to decide *not* to transfer the entitlement, then an inalienability rule may also be said to honor an entitlement less than fully because it deprives the entitlement holder of the autonomy to decide *to* effectuate a transfer.⁵²

33 and accompanying text. A rule prohibiting sales but allowing gifts will be referred to as a “Market Inalienability” rule. See *infra* note 142 and accompanying text.

⁵⁰ Calabresi & Melamed, *supra* note 4, at 1090-92.

⁵¹ This point is made by Coleman and Kraus, who state: “It is surely odd to claim that an individual's right is protected when another individual is permitted to force a transfer at a price set by third parties. Isn't the very idea of a forced transfer contrary to the autonomy or liberty thought constitutive of rights?” Jules L. Coleman & Jody Kraus, *Rethinking the Theory of Legal Rights*, 95 YALE L.J. 1335, 1338-39 (1986); see also Laura S. Underkuffler, *On Property: An Essay*, 100 YALE L.J. 127, 143-44 (1990) (arguing that the pervasively held conception of private property rights as defining an absolute realm of autonomy is flawed in ways that are particularly manifest in the Supreme Court's takings clause jurisprudence).

⁵² Although Calabresi and Melamed did not discuss whether liability rules might less than fully protect entitlements, they did see inalienability rules as in some sense limiting entitlements. They noted: “Unlike [property and liability] rules, rules of ina-

But the view that liability and inalienability rules do not fully protect entitlements (and the presumable corollary, that only property rules can fully honor entitlements) rests on a flaw in Calabresi and Melamed's analysis. The three rules do not protect and define the transferability of an already-allocated entitlement; rather, the rules themselves *constitute* the particular entitlement. For instance, if property law allows the government to purchase my house without my consent,⁵³ then compensation for relinquishing my house to the government—and not autonomy to decide whether to relinquish my house—is all that I am *entitled* to in that context. It is unhelpful and inaccurate to think of me as having a “general” entitlement to my house that is less than fully “protected” by a liability rule in the eminent domain context. It is more accurate and more useful to recognize that my entitlement to my house, within the context of eminent domain, is fully constituted by a liability rule. I have no legal entitlement to my house other than a liability rule in the eminent domain context; I have an entitlement precisely to compensation for the monetary value of the house and *not* to autonomy.⁵⁴

Nothing inherent in the concept of an entitlement requires that an entitlement entail autonomy as to the transfer of the object of the entitlement. One most certainly *could* construct an entitlement with a transfer autonomy element (that is, with initiation choice and/or veto power), but there is nothing logically or analytically problem-

lienability not only ‘protect’ the entitlement; they may also be viewed as limiting or regulating the grant of the entitlement itself.” Calabresi & Melamed, *supra* note 4, at 1093.

⁵³ See JACQUES B. GELIN & DAVID W. MILLER, *THE FEDERAL LAW OF EMINENT DOMAIN* 1 (1982) (“Eminent domain is the power of the sovereign to take property for public use without the owner’s consent.”). See also *Kohl v. United States*, 91 U.S. 367 (1875) (holding that the federal government may exercise the power of eminent domain).

⁵⁴ Thus, I have a liability-rule entitlement to my house in relation to the government that entitles me only to compensation for relinquishing the house for public purposes, but does not entitle me to autonomy to decide whether to relinquish the house at all. I have a property rule entitlement to my house in relation to prospective private buyers that entitles me to require compensation for relinquishing use of the house and also entitles me to autonomy to decide whether to relinquish use of the house. Similarly, an inalienability rule entitlement to my house would entitle me only to in-kind use of the house but not to autonomy to relinquish the house nor, since I may not relinquish, to receive compensation for relinquishment. The content of one’s entitlement to a particular good (here, my house) often varies depending on the context in which the entitlement is asserted. Cf. Calabresi & Melamed, *supra* note 4, at 1093 (“It should be clear that most entitlements to most goods are mixed. Taney’s house may be protected by a property rule in situations where Marshall wishes to purchase it, by a liability rule where the government decides to take it by eminent domain, and by a rule of inalienability in situations where Taney is drunk or incompetent.”).

atic about constructing an entitlement—such as a liability rule entitlement—without an autonomy element.⁵⁵

Thus, rules—such as property, liability, and inalienability rules—that determine entitlement forms are best thought of as the rules constituting or defining the structure of particular entitlements rather than as rules providing for the protection of pre-existing “general” entitlements.⁵⁶ Calabresi and Melamed’s three rules thus constitute three forms of entitlement, rather than one general kind of entitlement protected in three different ways.

Having made that conceptual clarification, we can now proceed to consider the combinations of the four entitlement components that constitute Calabresi and Melamed’s three entitlement forms. After examining the combinations of the four entitlement components within Calabresi and Melamed’s three entitlement forms, this Article will then go on to explore additional possible component combinations and the additional forms of entitlement created by those combinations.

A close look at Calabresi and Melamed’s three entitlement forms reveals how the three forms are distinguished by their different combinations of the in-kind enjoyment, initiation choice, veto power, and monetary compensation components. Under a property rule, the entitlement holder holds the in-kind enjoyment component (she has a right to in-kind enjoyment or use of the object of the entitlement—say, the house) and the monetary compensation component (she is entitled to monetary compensation in return for transfer of the in-kind enjoyment component—say, rental payments in return for use of the house), while an initiation choice and a veto power component are held by each party (either party may initiate a transfer of the in-kind component and such transfer will occur only upon the agreement of both parties).

⁵⁵ See Coleman & Kraus, *supra* note 51, at 1346. But see *id.* at 1339-40 (on the classical liberal view of entitlements as autonomy based).

Similarly, one also could construct an entitlement with no monetary compensation component. The holder of such an entitlement could not receive compensation for transferring the in-kind component of the entitlement. An example of an entitlement lacking a monetary compensation component is the entitlement to one’s bodily organs. For instance, most states allow the gift but not the sale of one’s kidney. See *infra* text accompanying notes 142-49 (discussing this form of entitlement).

⁵⁶ See Coleman & Kraus, *supra* note 51, at 1342 (stating that “rules [governing legitimate transfer of entitlements including rules permitting forced transfer for compensation] are best understood as . . . specifying the content or meaning of . . . rights. [P]art of the content of a right is a claim specifying the conditions of legitimate transfer.”). See also THEODORE M. BENDITT, *RIGHTS* 58-59 (1982) (distinguishing “property rights,” which are enforceable by injunction to ensure the right holder’s in-kind enjoyment of the right, from “compensation rights,” which are honored as long as the right holder receiving due compensation for damage to his in-kind enjoyment).

By contrast, under a liability rule, the nominal "entitlement holder" holds an entitlement composed of only in-kind, initiation choice, and monetary compensation components, but no veto power component. She is entitled to use of the house or to monetary compensation for relinquishing in-kind use, but she is not entitled to choose between those two. The nominally "non-entitled party" holds an entitlement composed of an initiation choice and a veto power component (in effect, an option to purchase the in-kind use component at a judicially determined price).⁵⁷ For example, the government acting in eminent domain is entitled to effectuate a compensated transfer of in-kind use of the property—to give the in-kind holder monetary compensation in return for in-kind use—even without the in-kind holder's consent.

Property and liability rule entitlement forms both entail the possibility that the in-kind enjoyment component of the entitlement will be transferred from the in-kind holder to the conflicting party. By contrast, inalienability rules do not contemplate transfer of the in-kind component. Under an inalienability rule, the entitlement is composed of only an in-kind use component and a veto power component; the monetary compensation and initiation choice components are extinguished.⁵⁸ Because the inalienable entitlement is non-transferable, it includes no monetary compensation component; the in-kind holder is not entitled to compensation for transferring the in-kind use component. Similarly, because the inalienable entitlement is non-transferable, it includes no initiation choice component; neither party may initiate transfer of the in-kind use component.⁵⁹

⁵⁷ Although courts and commentators customarily refer to the party holding the in-kind enjoyment component as the entitled party, it is misleading to speak of an entitled and a non-entitled party in the liability rule context. Where entitlement components are distributed such that each party holds some components, it is more accurate to refer to the party to whom the in-kind component is allocated as the "in-kind holder" and to the other party as the "conflicting party."

⁵⁸ More specifically, under an inalienability rule, the initiation choice component is extinguished (since no transfers are allowed, none may be initiated), and the veto power component is either irrelevant (since there can be no legitimate transfer initiations to respond to with a veto) or else abrogated (if veto is required, rather than just permitted, as when the other party *illegitimately* initiates a transfer).

⁵⁹ If the inalienable entitlement is violated—that is, if it is *illegitimately* infringed by a wrongdoer—then compensation may be due to the entitlement holder. This Article, however, is concerned with what may *legitimately* occur. Under a full inalienability rule, no party may legitimately effect a transfer, so there is no compensation value within the realm of what may legitimately occur.

For discussions of the role of the criminal law in preventing parties from violating the transfer control constraints of the various entitlement forms, see Coleman & Kraus, *supra* note 51, at 1365-68; RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 201-02 (3d ed. 1986); Alvin K. Klevorick, *On the Economic Theory of Crime*, in *CRIMINAL JUSTICE: NO-*

In addition to the three combinations of entitlement components represented in Calabresi and Melamed's schema, the four-component conception of entitlements suggests additional component combinations rendering additional entitlement forms. The following table represents the possible component combinations and the fourteen resulting entitlement forms.

On this table, the in-kind component holder is always represented as "Party A." Therefore, the posture of the in-kind component remains constant while the posture of the monetary compensation, initiation choice, and veto power components varies.

Only in rare circumstances is the initiation choice component of an entitlement abrogated.⁶⁰ For that reason, the table and the discussions that follow assume, unless otherwise specified, that both parties have initiation choice. The initiation choice component will be discussed only in those few contexts (specifically, the mandatory transfer rule and the full inalienability rule) in which initiation choice is *not* held by both parties.

MOS XXVII 289 (J. Roland Pennock & John W. Chapman eds., 1985); Calabresi & Melamed, *supra* note 4, at 1124-27.

⁶⁰ For a full discussion of this point, see *infra* notes 96-98 and accompanying text.

THE FORMS OF ENTITLEMENT
(with Party *A* holding the in-kind enjoyment component
in each instance)

		VETO			
		Party A Only	Party B Only	A & B	Neither
MONETARY COMPENSATION	Party A Only	1 REVERSE LIABILITY A holds In-kind A holds Veto A holds Monetary	2 LIABILITY A holds In-kind B holds Veto A holds Monetary	3 PROPERTY A holds In-kind A & B hold Veto A holds Monetary	4 I. COMBINED LIABILITY AND REVERSE LIABILITY II. MANDATORY TRANSFER* A holds In-kind Neither holds Veto A holds Monetary
	Party B Only	5 INCOHERENT A holds In-kind A holds Veto B holds Monetary	6 TRANSFERRED CLAIM A holds In-kind B holds Veto B holds Monetary	7 INCOHERENT A holds In-kind A & B hold Veto B holds Monetary	8 TRANSFERRED CLAIM WITHOUT REFUSAL A holds In-kind Neither holds Veto B holds Monetary
	A & B	9 INCOHERENT A holds In-kind A holds Veto A & B hold Monetary	10 TRANSFERRED CLAIM WITH DEDUCTIBLE A holds In-kind B holds Veto A & B hold Monetary	11 INCOHERENT A holds In-kind A & B hold Veto A & B hold Monetary	12 TRANSFERRED CLAIM WITH DEDUCTIBLE WITHOUT REFUSAL A holds In-kind Neither holds Veto A & B hold Monetary
	Neither	13 MARKET INALIENABILITY WITHOUT REFUSAL A holds In-kind A holds Veto Neither holds Monetary	14 UNCOMPENSATED TAKING A holds In-kind B holds Veto Neither holds Monetary	15 I. MARKET INALIENABILITY WITH REFUSAL II. FULL INALIENABILITY* A holds In-kind A & B hold Veto Neither holds Monetary	16 COMBINED UNCOMPENSATED TAKING AND MARKET INALIENABILITY WITHOUT REFUSAL A holds In-kind Neither holds Veto Neither holds Monetary

* As discussed above, in all but the two entitlement forms indicated by asterisks, both parties have initiation choice. See *supra* text accompanying note 60. For ease of exposition, the initiation choice component is not represented in each cell on the table. Rather, as stated above, see *id.*, both parties are understood to hold initiation choice unless otherwise indicated.

In addition to identifying the fourteen entitlement forms created by the possible combinations of the four entitlement components, this section will also discuss the efficiency and distributive characteristics of each entitlement form and the

contexts in which each form will be most appropriate and beneficial.⁶¹ In this Article, efficiency will be defined as "that allocation of resources which could not be improved in the sense that a further change would not so improve the condition of those who gained by it that they could compensate those who lost from it and still be better off than before."⁶² Distributive preferences, the

⁶¹ Efficiency and distributive considerations are widely accepted as capturing the critical dimensions of analysis for choosing the best entitlement form for any particular context. See, e.g., A. MITCHELL POLINSKY, *AN INTRODUCTION TO LAW AND ECONOMICS* 7-10 (1983); Calabresi & Melamed, *supra* note 4, at 1093-1101; Guido Calabresi, *About Law and Economics: A Letter to Ronald Dworkin*, 8 *HOFSTRA L. REV.* 553, 558 (1980).

While efficiency and distributive preferences are the two criteria generally focused upon in the literature, a third criterion is mentioned on occasion. The third criterion is sometimes termed "other justice reasons," as it was called by Calabresi and Melamed, who had the following to say about it:

To the extent that one is concerned with contrasting the difference between efficiency and other reasons for certain entitlements, the bipolar efficiency-distribution locution is all that is needed. To the extent that one wishes to delve either into reasons which, though possibly originally linked to efficiency, have now a life of their own, or into reasons which, though distributional, cannot be described in terms of broad principles like equality, then a locution which allows for "other justice reasons" seems more useful.

Calabresi & Melamed, *supra* note 4, at 1105; see also Calabresi, *supra*, at 559 ("[T]here are components of the just society that could only be encompassed in the terms efficiency and distribution if these terms were given a meaning far different from their ordinary ones.").

The present article will use definitions of efficiency and distribution that are broad enough (particularly in the case of distribution) to encompass "other justice considerations." The article presents "distributional considerations" as encompassing not only the broad issues of equality, but also the more idiosyncratic and individualized considerations of just desert and of the just distribution of benefits and burdens generally.

⁶² Calabresi & Melamed, *supra* note 4, at 1094. When Calabresi and Melamed offer that definition of efficiency, they add that "[t]his is often called Pareto optimality." *Id.* In fact, though, rather than defining Pareto optimality, the definition of efficiency offered is actually the Kaldor-Hicks definition of efficiency, often called "potential Pareto superiority." See, e.g., Guido Calabresi, *The Pointlessness of Pareto: Carrying Coase Further*, 100 *YALE L.J.* 1211, 1221 (1991); POSNER, *supra* note 59, at 13. The difference between the Pareto and Kaldor-Hicks definitions of economic efficiency turns on whether actual compensation is required. Under the Pareto definition, for a change from the status quo to be deemed efficient, the party who would otherwise lose by the change must be actually compensated. By contrast, under the Kaldor-Hicks definition, a change is efficient if the winner *could* compensate the loser and still benefit by the change; but the compensation need not *actually* occur. See POSNER, *supra* note 59, at 12-13; Jules L. Coleman, *The Normative Basis of Economic Analysis: A Critical Review of Richard Posner's The Economics of Justice*, 34 *STAN. L. REV.* 1105, 1106-07 (1982).

The Kaldor-Hicks measure of efficiency is used by some to measure efficiency defined as maximization of welfare, and by others to measure efficiency defined as maximization of wealth. This Article uses Kaldor-Hicks as a welfare-maximization measure. Debate is ongoing regarding the relative merits of the Pareto and the Kaldor-Hicks welfare-maximization and wealth-maximization definitions of efficiency. Because the welfare-maximization Kaldor-Hicks definition serves quite adequately for the purposes of this Article, I have adopted that definition for present purposes. For discussion of the strengths and weaknesses of the Pareto and Kaldor-Hicks definitions, see Calabresi, *supra*; Herbert Hovenkamp, *Legislation, Well-Being, and Public Choice*, 57 *U.*

second set of criteria for selecting entitlement forms, will be defined to include both broad visions regarding justice in the social distribution of wealth⁶³ (i.e., more or less equality) and narrower views regarding the relative worthiness of parties.

Each of the fourteen forms of entitlement has distinct efficiency and distributive characteristics; each promotes efficiency and distributes wealth in a particular way. For that reason, an entitlement form that may be efficiency-enhancing and distributively desirable in one context may impede efficiency or distribute wealth in an undesirable way in a different context. Some of the entitlement forms are optimal for efficiency and distributive purposes in a wide range of contexts (the Property rule is an example) while other forms (such as the Market Inalienability Without Refusal rule) will be optimal only rarely, in certain special circumstances. By examining the efficiency and distributive characteristics of each entitlement form, we will get a focused picture of the implications of using any particular form and a clearer understanding of which form will be most appropriate in any given context.⁶⁴

A. Quid Pro Quo: The Compensated Transfer Entitlement Forms

This Article will begin examination of the fourteen entitlement forms by considering the set of forms conforming to the most familiar format, that in which the in-kind holder may receive compensation for transferring in-kind use. After considering this set of entitlement forms, this Article will then consider sets of entitlement forms embodying alternative arrangements.

1. *The Property Rule*⁶⁵

The Property rule (represented in cell three) is perhaps the most familiar entitlement form. Under a Property rule, as discussed earlier,⁶⁶ Party *A* holds the in-kind and monetary compensation

CHI. L. REV. 63 (1990); POSNER, *supra* note 59, at 12-14; Jules L. Coleman, *Economics and the Law: A Critical Review of the Foundations of the Economic Approach to Law*, 94 ETHICS 649 (1984); Coleman, *Normative Basis*, *supra*.

⁶³ Throughout this Article, "wealth" refers not simply to monetary wealth, but to resources and benefits in general.

⁶⁴ The framework of fourteen entitlement forms applies both to publicly structured entitlements (such as banking regulation and governmental child custody provisions) and to privately structured entitlements constructed, for example, through the formation of contracts.

⁶⁵ Rather than beginning with a discussion of the Reverse Liability rule (cell one), we will first consider the Property Rule (cell three) and then the Liability rule (cell two) because they are more familiar entitlement forms.

⁶⁶ See *supra* Part II.B, at 414-416.

components, and either party may veto a transfer.⁶⁷ Party *A* will transfer the in-kind component only if Party *B* provides a price agreeable to Party *A*. Party *B*, by the same token, will purchase the in-kind component only if Party *A* is willing to sell at a price agreeable to Party *B*. For example, Party *A* will sell her house or car or Scrabble set to Party *B* only if Party *B* voluntarily provides a purchase price agreeable to Party *A*.

Property rules foster efficiency in a wide range of contexts for the following reasons. In the absence of transaction costs,⁶⁸ efficiency would be achieved through voluntary transactions, regardless of the initial allocation of entitlements.⁶⁹ That is, given costless transactions, self-interested individuals, each seeking to maximize his or her own welfare, would readily strike bargains that maximize total welfare. Having struck such a bargain, the parties would divide between themselves the surplus value generated by the efficient transaction, each thereby benefiting or, at the very least, one benefiting and neither losing. In the absence of transaction costs, then, we would expect to achieve efficiency if all entitlements were constructed as Property-rule entitlements.

The initial allocation of the in-kind component as well as the form of entitlement affects the distribution of wealth.⁷⁰ Suppose that I want to enjoy the beauty of the unplanted field between our houses, and you want to plant corn there. The beauty is worth two dollars to me and the corn-planting is worth three dollars to you. If a Property-rule entitlement to prevent planting is assigned to me, you will purchase from me the right to plant for some amount between two and three dollars — something more than the two dollars the beauty is worth to me and less than the total three-dollar value to you of planting — say, \$2.50. If, on the other hand, an entitlement to plant is given to you to begin with, then you will plant without having to pay me. The outcome is efficient in each case: the

⁶⁷ As stated above, *supra* text accompanying note 60, it is assumed throughout the article that, unless otherwise specified, both parties hold initiation choice.

⁶⁸ "[T]ransaction costs include the costs of identifying the parties with whom one has to bargain, the costs of getting together with them, the costs of the bargaining process itself, and the costs of enforcing any bargain reached." POLINSKY, *supra* note 61, at 12. See Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 15 (1960).

⁶⁹ See Calabresi & Melamed, *supra* note 4, at 1094; Coase, *supra* note 68. The observation that individuals will bargain to efficient outcomes in the absence of transaction costs regardless of the initial allocation of entitlements is premised on certain "Coasean" assumptions that I put to one side for now, such as the rationality of actors and the absence of externalities and of income effects.

⁷⁰ The publication in 1988 of *The Firm, the Market, and the Law*, by Ronald Coase, has rekindled debate regarding the nature and extent of the wealth-distribution effects of the allocation of legal entitlements. For an overview of the debate, see Stewart Schwab, *Coase Defends Coase: Why Lawyers Listen and Economists Do Not*, 87 MICH. L. REV. 1171, 1178-83 (1989).

land is put to its higher-value use, corn planting. But in the first case I get \$2.50. In the second case, you keep that \$2.50. That's a distributive difference. Thus, while (given Coasean assumptions)⁷¹ the initial allocation of the in-kind component will not affect the ultimate efficiency of the allocation of resources, the initial allocation of the in-kind component *will* affect the ultimate distribution of wealth.⁷²

Not only the initial allocation of the in-kind component but also the form of entitlement (that is, the distribution of the initiation choice, veto power, and monetary compensation components) has distributive implications. Use of a Property rule allocates wealth to the in-kind holder and away from the conflicting party. The in-kind holder enjoys the in-kind use of the object of the entitlement or, if she decides to sell in-kind use, she receives monetary compensation in return for relinquishing in-kind use.

In sum, Property rules allow for voluntary transactions that maximize efficiency and distribute wealth equitably, in the absence of transaction costs or other countervailing factors. Of course, transaction costs and other countervailing factors abound in the world, and give rise to the need for a range of alternative entitlement forms, now to be discussed.

2. *The Liability Rule*

In contrast to the Property rule, in which transfer requires mutual consent, a Liability rule (represented in cell two) permits the conflicting party to force a compensated transfer. The conflicting party has that power because, under the Liability rule, the conflicting party holds the only veto power.⁷³ (The in-kind holder still holds the monetary compensation component.)

An additional example of a Liability rule (besides the eminent domain example discussed above) is a pollution compensation system. Here, Party *B*, a pollution-producing industry, may pollute and thereby infringe on Party *A*'s in-kind entitlement to freedom from pollution, provided that Party *B* pays monetary compensation to Party *A*.⁷⁴ Under such an arrangement, Party *A* holds the in-kind enjoyment component (freedom from pollution) and the monetary compensation component (claim to monetary compensation for re-

⁷¹ See *supra* note 69 (regarding Coasean assumptions).

⁷² See Jules L. Coleman, *Efficiency, Exchange, and Auction: Philosophic Aspects of the Economic Approach to Law*, 68 CAL. L. REV. 221, 225 (1980). But see *supra* note 70 (referring to current debate as to the nature and extent of distributive effects).

⁷³ A party holding the *only* veto power is in a powerful position because, while she can veto a transfer if she wishes, she also can force a transfer since the other party lacks the power to veto it.

⁷⁴ See, e.g., *Boomer v. Atlantic Cement Co.*, 257 N.E.2d 870 (N.Y. 1970).

linquishing in-kind use) while Party *B*, because she holds the only veto power, may force a compensated transfer of the in-kind (freedom from pollution) component.

Another example of a Liability rule is a "call." A call is a stock option that permits Party *B*, the conflicting party, during the period of the option arrangement, to force a compensated transfer in which she purchases stock from the in-kind holder at a pre-negotiated price.⁷⁵ Party *A*, the in-kind holder of the stock, holds the monetary compensation component, while Party *B* holds initiation choice and the only veto power.

The example of calls illustrates that full transfer control (i.e., holding initiation choice and the only veto power) is itself a thing of value separate from the value of the in-kind component. Holding a call is advantageous since its holder has the option to either buy the stock from Party *A* (if the pre-negotiated "exercise" price is lower than the market price of the stock at the time of the potential forced transfer), or refrain from buying at the pre-set price (if the market price is lower than that exercise price). Not surprisingly, therefore, a price, called a "premium," is paid for the purchase of a call. In effect, the premium is the price for purchase of the in-kind holder's veto power.⁷⁶

The efficiency implications of the Liability rule are best understood by comparison with the Property rule. As noted earlier, a major problem with constructing all entitlements as Property-rule entitlements is that transaction costs do exist and necessitate the use of other entitlement forms in some circumstances if efficiency is to be achieved. If transaction costs are high in a given situation, then efficiency may not be achieved because voluntary efficient transactions are too costly.⁷⁷ The transaction costs attending transfer of

⁷⁵ See JAMES D. COX ET AL., *SECURITIES REGULATION: CASES AND MATERIALS* 1290-93 (1991); Norman S. Poser, *Options Account Fraud: Securities Churning in a New Context*, 39 BUS. LAW 571, 586-88 (1984).

⁷⁶ Consistent with the idea that full transfer control (i.e., initiation choice plus the only veto power) constitutes a thing of value separate from the in-kind component, it is worth noting that the Securities and Exchange Commission regulates calls as separate securities apart from the underlying stock to which they refer. See COX ET AL., *supra* note 75, at 1293; Poser, *supra* note 75, at 588.

⁷⁷ See Calabresi & Melamed, *supra* note 4, at 1106; cf. Calabresi, *supra* note 62 (discussing Pareto [as distinct from Kaldor-Hicks] efficiency and arguing that transaction costs, like the limits of existing technology, define the Pareto frontier and that, therefore, society is always at, or will immediately arrive at, a Pareto optimal point *given* transaction costs); Louis De Alessi, *Form, Substance, and Welfare Comparisons in the Analysis of Institutions*, 146 J. INSTITUTIONAL & THEORETICAL ECON. 5, 14 (1990) (observing that information costs, a type of transaction cost, may pose a barrier that precludes what would otherwise be an efficient transaction but that, *given* information costs, "there is nothing inefficient about the [transaction not occurring]. If information were free [i.e., if transactions were costless], it is true that trade would surely take place and both parties

the in-kind use component may be so great as to preclude an efficient transfer. In such a case, use of a Liability rule may facilitate efficient transfers because the transaction costs associated with individual price negotiations are avoided by the court's setting the compensation price at which the in-kind component may be "purchased" by the conflicting party.⁷⁸

Liability rules can also serve distributive, rather than strictly efficiency, purposes. Going back to the cornfield example, what would we do if transaction costs precluded the efficient transfer under a Property rule of in-kind use of the land from the beauty lover to the corn grower? One solution would be to give a Property-rule entitlement to the corn grower, thereby ensuring that the land is put to its highest-value use.⁷⁹ But, in giving the Property-rule entitlement to the corn grower to ensure efficiency, we also distribute wealth to the corn grower and away from the beauty lover. What if we had distributive justice considerations that favored distributing wealth to the beauty lover rather than to the corn grower? We might in this case give a Liability-rule entitlement to the beauty lover and thereby facilitate an efficient transfer in which the beauty lover receives compensation for relinquishing in-kind use of the land to the corn grower. We would do so *not* only to promote efficiency (which could just as well be achieved by simply giving a Property-rule entitlement to the corn grower) but to promote what we view as a preferable distribution (i.e., wealth goes to the beauty lover) while still achieving an efficient resource allocation (i.e., corn is planted). Thus, in cases involving high transaction costs, Liability rules can be used to ensure that the distributively-favored party gets (some or most of) the monetary value of use of the object of the entitlement while the efficient party⁸⁰ gets the in-kind use of the object of the entitlement.⁸¹

It is worth noting that Liability rules are not *as* distributively advantageous to in-kind holders as are Property rules. Under a Liability rule, the in-kind holder, having no veto power, cannot refuse to relinquish the in-kind component even if she values in-kind use

would be better off. They would also be better off in a world in which transportation costs . . . were zero. . . . Alas, both transportation and information typically are costly.").

⁷⁸ See Calabresi & Melamed, *supra* note 4, at 1106-10.

⁷⁹ I am assuming here that we know the highest value use. I leave aside just for now the problem that we do not always have that information when assigning entitlements.

⁸⁰ I use the term "efficient party" to refer, of course, to the party who will put the object of the entitlement to its higher-value use—not to describe a party who is, in some more general way, "efficient."

⁸¹ See Calabresi & Melamed, *supra* note 4, at 1110.

more than the monetary compensation to be provided.⁸² Thus, Liability rules, while relatively distributively favorable to in-kind holders are not as favorable as entitlement forms that give the in-kind holder more control over transfer.

While the Liability rule serves to minimize transaction costs and so to foster efficiency as well as distributive goals, the rule does not circumvent all transaction costs, nor otherwise structure legal relations optimally in all possible contexts. A variety of additional entitlement forms must still be considered.

3. *The Reverse Liability Rule*

In contrast to the regular Liability rule in which the conflicting party may force a compensated transfer, in a Reverse Liability rule (cell one), the in-kind holder may force a compensated transfer. Under the Reverse Liability rule, the in-kind holder holds both the only veto power and the monetary compensation component. Therefore, the in-kind holder can force a compensated transfer of the in-kind component to the conflicting party.⁸³

An example of a Reverse Liability rule entitlement is a "put," the opposite kind of stock option from a call. In a put arrangement, Party *A*, the in-kind holder of the stock, may force a sale of that stock to Party *B* at a pre-negotiated price during the option period.⁸⁴ In other words, Party *A*, the in-kind holder (of, in this example, the stock), holds the monetary compensation component and, crucially, the only veto power. Thus, Party *A* can force a compensated transfer of the in-kind component (the stock) to Party *B* who lacks veto power. Like calls, puts are purchased by payment of a premium which constitutes, in effect, the purchase price of the conflicting party's veto power.

Another example of a Reverse Liability rule is a buy-out scheme such as the gun buy-out recently offered by the St. Louis police department.⁸⁵ Under that program, the department offered to pay twenty-five to fifty dollars for any gun in working order turned in during the buy-out period. The sellers of the guns were permitted to remain anonymous, and the police department bought the guns

⁸² Under a Liability rule, the amount of compensation allocated to the in-kind holder will be set collectively. The "objective" price set by the collective (usually, by a court) may or may not equal the holder's subjective valuation of the in-kind component.

⁸³ The Reverse Liability entitlement form is thus precisely the reverse of the regular Liability rule because, under the Reverse Liability rule, the in-kind holder (rather than the conflicting party) can force a compensated transfer.

⁸⁴ See COX ET AL., *supra* note 75, at 1290; Poser, *supra* note 75, at 586.

⁸⁵ See Isabel Wilkerson, *In St. Louis, Lining Up to Sell Guns to Police*, N.Y. TIMES, Oct. 23, 1991, at A1. In 1991, Philadelphia, San Francisco, and Pontiac, Michigan held similar gun-buyout programs. *Id.* at A12.

with "no questions asked."⁸⁶ In this way, the in-kind holders could force a compensated transfer of the guns to the police department.⁸⁷

Reverse Liability rules promote efficiency in a variety of ways. Two of the efficiency-enhancing functions of Reverse Liability rules operate by permitting desirable risk allocation. Arrangements such as puts,⁸⁸ for instance, permit investors to control their ratios of risk to potential profits in ways consistent with their own risk preferences.⁸⁹ By allowing investors to satisfy their own risk preferences, puts help to maximize welfare. In addition, allowing investors to control their risk exposure while still making certain investments may encourage some proportion of efficient investments that would be deterred by their attendant risks if those risks could not be spread.⁹⁰

Another efficiency-enhancing function of Reverse Liability rules operates by creating incentives for in-kind holders to dispose of particular goods in ways that do not impose social costs (externalities).⁹¹ Gun buy-out offers by police departments and soft-drink container deposit redemption laws represent instances where Reverse Liability rules are used to create incentives for individuals to dispose of certain goods in socially desirable ways. Offers of compensation for guns or bottles turned in to the police department or recycling agencies (respectively) give in-kind holders financial incentives to dispose of those items in the socially desired manner, rather than letting guns "fall into the wrong hands" or bottles fall by the wayside.

From a distributive standpoint, Reverse Liability rules are highly advantageous to the in-kind holder. The Reverse Liability rule entitles the in-kind holder to compensation for relinquishing the in-kind component. And, like the Property rule, the Reverse Li-

⁸⁶ *Id.* at A12.

⁸⁷ Other examples of Reverse Liability rules include stock tender offers, *see generally* ROBERT C. CLARK, CORPORATE LAW 531-33 (1986), and deposit/return schemes such as the provisions in most states for redemption of deposits on soft drink containers. *See, e.g.,* CAL. PUB. RES. CODE § 14,560 (West Supp. 1991); VT. STAT. ANN. tit. 10, § 1522 (1984).

⁸⁸ Puts are stock options that allow the in-kind holder of stocks to force a compensated transfer to the conflicting party. *See supra* note 84 and accompanying text.

⁸⁹ *See* COX ET AL., *supra* note 75, at 1292; Poser, *supra* note 75, at 588.

⁹⁰ Puts render their efficiency benefits as risk-allocation devices and facilitators of investment at the time of the investment, rather than at the time of the forced transfer. Indeed, there is no reason to believe that the present forced transfer of stock at a prearranged price that, presumably, exceeds the current market price is an efficient transfer in which the buyer will put the stock to a higher-valued use than the seller.

⁹¹ "An externality is . . . usually defined as the effect of one person's decision on someone who is not a party to that decision." RONALD H. COASE, THE FIRM, THE MARKET, AND THE LAW 24 (1988).

ability rule allows the in-kind holder to veto compensated transfers that she views as disadvantageous. But the Reverse Liability rule is even more distributively advantageous to the in-kind holder than the Property rule because, in addition to allowing the in-kind holder to veto transfers that she does not desire, the Reverse Liability rule also allows her to force compensated transfers that she does desire. The Reverse Liability rule thus allows the in-kind holder to force those transfers that will be advantageous to herself and to veto the rest.

In sum, the Reverse Liability rule allows the in-kind holder to force or veto a compensated transfer at will. This structure is itself a thing of value to the in-kind holder (as reflected in the premium paid for puts). In addition, Reverse Liability rules can be used to create incentives for socially-desirable transfers which might not otherwise occur (for instance, where gun holders might not come forward to turn in guns in the absence of a buy-out offer).

4. *The Combined Liability and Reverse Liability Rule and the Mandatory Transfer Rule*

Unlike the other cells discussed thus far, cell four may represent one of two possible rules. This is so because, in this cell, there are two possible postures of the initiation choice component, as shall be discussed momentarily.

a. *The Combined Liability and Reverse Liability Rule*

The first of the two cell-four rules, the Combined Liability and Reverse Liability rule (cell four, rule I), combines the features of the Liability and the Reverse Liability rules, discussed above. Under the Combined Liability and Reverse Liability rule, either party can force a compensated transfer. Under this rule, Party *A*, the in-kind holder, holds the monetary component, and neither party holds a veto power.

Examples of Combined Liability and Reverse Liability rules include partnership and close corporation buy-sell agreements. In such agreements, Party *A*, the in-kind holder, has an ownership interest in a partnership or a close corporation which he may, under certain conditions, require Party *B* (the other partner(s) or the close corporation itself) to buy out. Reciprocally, the partnership or corporation may, under specified conditions, force Party *A* to relinquish his ownership interest in return for compensation.⁹² In such ar-

⁹² CLARK, *supra* note 87, at 765 (discussing buy-sell agreements in the context of close corporations); ALAN R. BROMBERG & LARRY E. RIBSTEIN, BROMBERG & RIBSTEIN ON PARTNERSHIP § 7.02, at 7:22-23, 7:27-29 (1991) (discussing withdrawal and expulsion agreements in the context of the Uniform Partnership Act).

rangements, Party A holds the in-kind component and the monetary compensation component, while neither party holds a veto power. Thus, either party can force a compensated transfer of the in-kind (ownership) component.⁹³

In certain specialized circumstances, the Combined Liability and Reverse Liability rule will foster efficiency. The rule reduces the transaction costs inherent in "closed markets." That is, where only one potential buyer and/or seller exists for a given good, hold-out behavior by the buyer or seller may hinder efficient transfers. Moreover, the anticipation that the other party in a closed market might in the future refuse to buy (or sell, as the case may be) at a reasonable price will prevent individuals from making investments and entering into worthwhile business enterprises. The Combined Liability and Reverse Liability rule provides a substitute for regular market mechanisms that helps to avoid such market failures.

⁹³ Buy-sell agreements are often described and, indeed, are often worded as if, rather than creating Combined Liability and Reverse Liability rules, they create Mandatory Transfer rules (where both parties are forced to effectuate a transfer even if neither party wishes to). See *infra* text accompanying notes 99-102 (discussing Mandatory Transfer rules). For example, Robert Clark states that "[b]uy-sell agreements obligate the owner of shares to sell them, and the corporation or other shareholders to buy them, on the happening of certain events" CLARK, *supra* note 87, at 765. Similarly, the buy-sell agreement at issue in *Jordan v. Duff & Phelps, Inc.*, 815 F.2d 429 (7th Cir. 1987), *cert. denied*, 485 U.S. 901 (1988), stated that "[u]pon the termination of any employment with the Corporation . . . the individual whose employment is terminated or his estate shall sell to the Corporation, and the Corporation shall buy, all shares of the Corporation then owned by such individual or his estate." *Id.* at 432. These wordings would seem to imply that the compensated transfer of shares is mandated regardless of the parties' wishes. But that characterization of buy-sell agreements is surely inaccurate. If both parties were to agree not to transfer, then the transfer would not occur. The parties would be under no obligation to effectuate a transfer if neither party cared to do so. For that reason, it is more accurate to conceive of buy-sell agreements as arrangements that give both the would-be buyer and the would-be seller the *option* of forcing a compensated transfer but do not mandate the exercise of that option. It is as though the would-be buyer has a call (a straight Liability rule arrangement, see *supra* note 75 and accompanying text) and the would-be seller has a put (a straight Reverse Liability rule arrangement, see *supra* note 84 and accompanying text). In other words, buy-sell agreements are precisely Combined Liability and Reverse Liability rules—and are not Mandatory Transfer rules (where both parties are necessarily forced to effectuate a transfer) at all.

It is true that the Internal Revenue Code attaches certain tax benefits where restrictions (such as buy-sell agreements) on stock issued as employment compensation are restrictions that "by [their] terms will never lapse." 26 U.S.C. § 83(d)(1) (1988). But section 83 of the tax code does not transform buy-sell agreements from Combined Liability and Reverse Liability rules into Mandatory Transfer rules. Rather, section 83 recognizes that such restrictions on the transferability of stock can be canceled by the parties. The Internal Revenue Code therefore provides that, if a restriction on stock transferability is canceled, then the in-kind holder of the stock must report as income the net increase in value of the stock holdings that results from the restriction cancellation. *Id.* § 83(d)(2). In other words, the buy-sell agreement is not a mandatory transfer structure.

For example, partnership and close corporation buy-sell agreements allow business associations to survive as going concerns while also allowing for unimpeded exit by individual partners or shareholders and for the expulsion of individuals not wanted by the other members of the firm. Specifically, under the Reverse Liability prong of the Combined rule, partners and shareholders who wish to exit are assured a market for their in-kind holdings because they may force a compensated transfer. This assurance of liquidity is, in itself, a benefit to the partner or shareholder.⁹⁴ In addition, the Reverse Liability prong of the Combined rule fosters efficiency by facilitating the formation of and investment in business associations by persons who might be unwilling to participate without assurance of unimpeded exit through a ready market for their holdings. Under the Liability prong of the Combined rule, which allows forced buy-outs of the holdings of individual partners or shareholders, the business association retains control of the membership in the ongoing enterprise. This control over membership may foster harmonious relations within the partnership or closely held corporation.⁹⁵ Thus, use of the Combined Liability and Reverse Liability rule in this context helps to avoid certain kinds of market failures by providing a substitute for regular market mechanisms.

For the in-kind holder, the Combined Liability and Reverse Liability rule is more distributively favorable than the Liability rule, and less distributively favorable than the Reverse Liability rule. As with the Property, Liability, and Reverse Liability rules, the Combined Liability and Reverse Liability rule entitles the in-kind holder to compensation for relinquishing the in-kind component. Since either party may force a compensated transfer under the Combined rule, transfers will occur when advantageous to either party.

b. *The Mandatory Transfer Rule*

As mentioned above, cell four may represent one of two possible rules depending upon the posture of the initiation choice component. To initiate a transfer is to make an offer of or request for transfer, subject to possible veto if the other party holds a veto power.⁹⁶ In the entitlement forms discussed thus far, we have assumed that both parties hold initiation choice—that there would be

⁹⁴ See CLARK, *supra* note 87, at 765. Such assured liquidity will often be of particular importance to the partner's or shareholder's estate. *Id.*

⁹⁵ JAMES D. COX, *SUM & SUBSTANCE OF CORPORATIONS* § 13.4130 (5th ed. 1988).

⁹⁶ See *supra* note 35 and accompanying text. To initiate a transfer is, thus, to set into motion a transfer that may be stopped only by a veto by the other party (if that other party holds veto power). This "setting into motion" or "initiation" of transfer necessarily involves the waiver of any veto power held by the initiator.

nothing to stop either party from initiating a transfer (subject to possible veto) or from refraining from initiating a transfer.

The initiation choice that has been assumed thus far is bilateral in that it includes both an active "initiation power," (the power to initiate a transfer) and a passive "repose power" (the power to refrain from initiating a transfer).⁹⁷ The bilateral initiation-choice assumption holds in all but two of the fourteen possible entitlement forms. The two exceptions are as follows. First, neither party has initiation power if the parties are prohibited from effectuating a transfer (as in the case of fully inalienable entitlements such as the right to vote, discussed below). Second, besides abrogating initiation choice by prohibiting transfer, we might abrogate initiation choice by *requiring* transfer (as in the case of Mandatory Transfer entitlements, to be discussed presently). If the parties are required to effectuate a transfer, then neither party has repose power. In either case—where initiation power or repose power is absent—neither party has initiation *choice*.⁹⁸

⁹⁷ Cf. Hart, *supra* note 7, at 166-67 (discussing bilateral and unilateral liberty rights in the work of Bentham and Hohfeld).

⁹⁸ Both parties hold bilateral initiation choice in all but two of the fourteen possible entitlement forms. The abrogation of repose power or initiation power in the context of any of the other twelve forms would create absurd results. If we remove repose power from both parties (thereby requiring each to initiate transfer), we thus require that transfer occur, unless one or both parties also holds a veto (as will be discussed momentarily). If that required transfer is to be a compensated transfer, then we have described the Mandatory Transfer rule: a compensated transfer is required. If the required transfer is to be *uncompensated*, then the resulting entitlement form would be nonsensical. Rather than defining an entitlement form in which the nominal in-kind holder is required presently to transfer the in-kind component to the conflicting party free of charge, it would be more sensible to relabel the parties and identify the heretofore nominally conflicting party as the actual in-kind holder.

We can now consider the implications of removing repose power from both parties if either party holds veto power. Removal of repose power from both parties turns out to be nonsensical if either party holds a veto. Requiring me to initiate a transfer if I hold a veto power by which I can veto the transfer as soon as I initiate it is absurd. Similarly, nothing is to be gained by requiring me to initiate a transfer if you are free to veto it.

Removal of repose power from only *one* party (that is, requiring one party to initiate transfer) also makes little sense. If the initiating party has veto power, then that party can veto transfer as soon as he or she initiates it. If the non-initiating party has veto power, then it is hard to see what is gained by requiring initiation.

Let us now consider removals of initiation, rather than repose, powers. If we remove initiation power from both parties, we thereby prohibit transfer. Where all transfer is prohibited, the entitlement form is Full Inalienability. Any other entitlement form is transformed into a de facto Full Inalienability rule if initiation power is removed from both parties.

There is one exception to the rule that bilateral initiation choice must be held by both parties under all but two possible entitlement forms. We *could* remove initiation power from only one party in any of the entitlement forms in which we ordinarily assume initiation choice by both parties. It might be advantageous to remove one party's initiation power in circumstances where overreaching is feared. That is, if a less powerful party might be inhibited from vetoing a transfer initiated by the more powerful party,

The latter case, where transfer is actually mandated, constitutes the Mandatory Transfer rule (cell four, rule II). Under this entitlement form, the parties *must* effectuate a compensated transfer of the in-kind component, even if neither party so desires. Under the Mandatory Transfer rule, the in-kind holder holds the monetary compensation component, neither party holds veto power, and neither party holds initiation choice (since neither holds repose power).

One example of a Mandatory Transfer rule is the mandatory receivership provisions of the Federal Deposit Insurance Corporation Improvement Act of 1991.⁹⁹ The Act provides that the appropriate federal banking agency, usually the Federal Deposit Insurance Corporation (FDIC), *must* seize insured depository institutions that remain critically undercapitalized¹⁰⁰ for a specified period of time.¹⁰¹

By taking over as receiver, the federal banking agency, say, the FDIC, transfers to itself the in-kind component of the entitlement to

then we might prohibit the more powerful party from initiating a transfer. Only the less powerful party would be permitted to initiate a transfer. Of course, the more powerful party might effectively pressure the less powerful party to initiate transfer just as she would have effectively pressured the less powerful party not to exercise his veto. It is, therefore, difficult to imagine circumstances in which removing one party's initiation power would successfully redress an overreaching problem. If, however, such circumstances were to present themselves, a one-party initiation-ban adjustment to any of the twelve rules in which we usually assume bilateral initiation choice might be beneficial.

In sum, with the possible rare exception of a one-party initiation-ban modification of any entitlement form, bilateral initiation choice (initiation power and repose power) would be held by both parties in all but two (Mandatory Transfer and Full Inalienability) of the possible entitlement forms.

⁹⁹ Federal Deposit Insurance Corporation Improvement Act of 1991, Pub. L. No. 102-242, 105 Stat. 2236 (codified in scattered sections of 12 U.S.C.).

¹⁰⁰ "Critical undercapitalization" is determined as follows:

"(3) CRITICAL CAPITAL —

"(A) AGENCY TO SPECIFY LEVEL. —

"(i) LEVERAGE LIMIT. — Each appropriate Federal banking agency shall, by regulation, in consultation with the Corporation, specify the ratio of tangible equity to total assets at which an insured depository institution is critically undercapitalized.

...

"(B) LEVERAGE LIMIT RANGE. —

The level specified under subparagraph (A)(i) shall require tangible equity in an amount —

"(i) not less than 2 percent of total assets; and

"(ii) except as provided in clause (i), not more than 65 percent of the required minimum level of capital under the leverage limit.

12 U.S.C.A. § 18130(c)(3)(A)-(B) (West 1992).

¹⁰¹ Mandatory receivership is provided for where the depository institution has been undercapitalized on average during the calendar quarter beginning 270 days after the date on which the institution became critically undercapitalized. 12 U.S.C.A. § 18310(h)(3)(C)(i) (West 1992).

the bank—that is, the bank's assets and liabilities. In return, the FDIC owes to the former holders of the in-kind component (that is, to the stockholders) the monetary value of that in-kind component. In other words, under the mandatory receivership provisions of the Act, the FDIC and the stockholders must effectuate a compensated transfer of the in-kind component from the stockholders to the FDIC.¹⁰²

A Mandatory Transfer rule will foster efficiency where two sets of conditions obtain: first, that it is clear in advance that allocation of in-kind use to a particular party is efficient,¹⁰³ but distributive considerations favor compensating the other party; and second, that (for reasons discussed below) we cannot be sufficiently sure that, if we allocate the in-kind use component to the distributively-favored party under a Property or even a Liability rule, the compensated transfer of the in-kind component to the efficient party will occur. In such circumstances, a Mandatory Transfer rule can be used to force the efficient transfer while allocating compensation to the distributively-desirable party.

For instance, knowing that in-kind use of the land by the corn grower is efficient, and distributively favoring the beauty lover, we could consider using a Mandatory Transfer rule to force a compensated transfer of in-kind use from the beauty lover to the corn grower. But, one might argue, the same efficient transfer would occur under a Property or Liability rule. After all, what *makes* the transfer efficient is precisely that in-kind use is worth more in the hands of the conflicting party (here, the corn grower) than in the hands of the in-kind holder, so we would expect the conflicting party to make the purchase voluntarily. For that reason, Mandatory

¹⁰² In most cases to date, the monetary value of the insolvent bank has been nil—so the stockholders have received no compensation. In theory, however, the bank could retain residual value even after all of its creditors have been paid. Since the critical undercapitalization that triggers mandatory receivership is defined as a level of tangible equity not less than two percent of total assets, 12 U.S.C. § 18310(c)(3)(B)(i), one may hope that receiverships will commence before all is lost so that the bank may actually retain some residual value affording some compensation to its stockholders. Indeed, avoiding a “negative residual” (that is, a negative value of the bank that requires a draw on the FDIC insurance fund to pay all creditors) is a main purpose of requiring mandatory receivership at the two percent equity level.

¹⁰³ Mandatory transfer rules promote efficiency *only* where the efficient allocation of resources is clear *ex ante*. Where we are uncertain about the efficient allocation, enforcing a certain allocation by a Mandatory Transfer rule might well result in inefficiency. To compare, under a Liability rule, the conflicting party can choose whether to purchase the in-kind use component at the collectively-set price. Presumably, the conflicting party will make the purchase if and only if the transfer is efficient. By contrast, the collectively-set price is irrelevant for purposes of allocative efficiency under the Mandatory Transfer rule, since price does not affect allocation.

Transfer rules are rarely necessary (and, indeed, would not be necessary in the corn grower and beauty lover case).

In one sort of circumstance, however, the Property- or Liability-rule system breaks down. In the usual case, the surplus value generated by the efficient transfer goes to the conflicting party, the purchaser of the in-kind component (minus whatever part of that surplus she pays to the in-kind holder, the seller). But we can imagine a circumstance in which the surplus value—the benefit from the transfer—goes to a third party. In this situation, what makes a transfer efficient is not a benefit to the purchaser or seller but, rather, a benefit to a third party. For instance, to alter the corn-grower and beauty-lover example, imagine now that the value of the land to the beauty lover and to the corn grower is equal. That is, to relinquish in-kind use of the land to the corn grower, the beauty lover would charge the full three dollars that is the value of the land to the corn grower. But a neighbor across the road loves to smell corn growing. The fragrance is worth fifty cents to him. The transfer of in-kind use to the corn grower is now revealed to be efficient after all (the total value of growing corn, including the value to the third party, is \$3.50 while the total value of not growing corn is \$3.00). But what makes the transfer efficient is not a benefit to the corn grower or the beauty lover but, rather, a benefit to a third party, a positive externality.

But why use a Mandatory Transfer rule in this situation? Why should the conflicting party (the corn grower) be forced to spend her money to secure a benefit for a third party? One possible reason is that the conflicting party owes a duty to the third party. Perhaps the corn grower has a contractual obligation to the third-party neighbor to produce corn fragrance.

Still, why do we need a Mandatory Transfer rule? Why not simply allow the third-party neighbor to sue the conflicting-party corn grower for an injunction and/or damages if she fails to provide the benefit (corn fragrance) owed? Presumably, the threat of paying damages will provide sufficient incentive for the conflicting-party corn grower to purchase the in-kind use of the land. That is, purchasing the in-kind component will actually benefit the conflicting party since it allows her to avoid paying damages to the third party. Again, then, a Property or a Liability rule should suffice.

Mandatory Transfer rules are in fact superfluous in most cases and (I concede, finally to rid us of the cornfield example) would not be necessary in the corn grower case. Nonetheless, a Property or Liability rule would not suffice in two sorts of exceptional cases. The first is when avoiding even infrequent violations of the duty to the third party is extraordinarily important. The second is when vi-

olation of the duty to the third party may be difficult to detect or prove.¹⁰⁴

The first of those efficiency-based rationales for Mandatory Transfer rules, that Mandatory Transfer is useful where even infrequent violation of a duty to third parties would be unacceptable, is reflected in the mandatory receivership provisions of the Federal Deposit Insurance Corporation Improvement Act of 1991 (F.D.I.C.I.A.).¹⁰⁵ It will be recalled that, under the mandatory receivership provisions of the Act, the federal banking agency and the stockholders of the undercapitalized depository institution are required to effectuate a compensated transfer of the in-kind component of the entitlement to the depository institution from the stockholders to the federal agency as receiver. The third parties to whom a duty is owed, and whom the mandatory receivership provisions protect are the members of the public.¹⁰⁶ The FDIC owes the public a duty to avoid depletion of the FDIC insurance fund. Bank failures are expensive. Even infrequent failures may unacceptably burden the public fisc. Thus, the first efficiency-based rationale for Mandatory Transfer rules, that such rules will be efficient where avoiding even infrequent breaches of a duty to a third party is extraordinarily important, applies to the mandatory receivership provisions.

The second efficiency-based rationale for Mandatory Transfer rules is, again, that Mandatory Transfer rules will minimize enforcement difficulties and costs in some contexts in which violations of duties to third parties would be difficult to detect or prove. Mandat-

¹⁰⁴ The possibility of a mandatory entitlement is implied by Martin Golding in his discussion of mandatory exercise of rights. Martin P. Golding, *Towards a Theory of Human Rights*, 52 *MONIST* 521, 546-47 (1968). In the present context, of course, I am discussing a mandatory transfer, as opposed to a mandatory exercise of an entitlement. See also JOEL FEINBERG, *RIGHTS, JUSTICE, AND THE BOUNDS OF LIBERTY* 233 (1980)

A mandatory right . . . confers no discretion whatever on its possessor: only one way of exercising it is permitted. . . . If I have a mandatory right to do X then it follows logically that I have—not a right to do X—but rather a *duty* to do X. In the case of mandatory rights, duty and right are entirely coincident[al].

¹⁰⁵ Federal Deposit Insurance Corporation Improvement Act of 1991, Pub. L. No. 102-242, 105 Stat. 2236; see *supra* notes 99-100.

¹⁰⁶ In the context of depository institution regulation, the public stands as a third party to the transactions because the public acts through agents (through federal agencies). Because the interests of the public and the agents may not be identical (for instance, regulators may be "captured" by private interests), issues of accountability and control of the agent arise. Mandatory Transfer rules are one way to manage such agency costs and to ensure that the duty to the third party (the public) is properly fulfilled.

I do not mean to imply here that Mandatory Transfer rules necessarily involve agency relationships. Rather, Mandatory Transfer rules may be useful in a variety of contexts, both public and private, involving duties owed to third parties. For instance, I will discuss in a subsequent article the use of Mandatory Transfer rules in the context of private employment contracts.

ing the contemplated transfer in those contexts will reduce the difficulty or cost of enforcing the duty to the third party.

This second rationale for Mandatory Transfer rules surely also underlies the F.D.I.C.I.A. mandatory receivership provisions. Because many factors coalesce to cause failures of depository institutions, it is difficult to ascertain after the fact whether a failure of duty by the relevant federal agency contributed to the failure of a particular depository institution. In such cases, where effective determination of causation is difficult and, therefore, accountability is reduced, use of a Mandatory Transfer rule may improve performance. As stated in the United States General Accounting Office's Report on Bank Supervision, "while we cannot conclusively show that the regulators would have achieved better outcomes in these cases [dealing with banks with capitalization problems] by using more forceful actions, we believe that the supervisory process could benefit from . . . greater certainty regarding the regulatory responses"¹⁰⁷

In sum, Mandatory Transfer rules may foster efficiency under the following conditions. First, allocation of in-kind use to a particular party is clearly efficient but distributive considerations favor compensation to the other party. Second, fulfillment of a duty to a third party depends upon occurrence of the efficient transfer. And third, because fulfillment of the duty to the third party is crucial and/or because failures to fulfill the third-party duty may be hard to detect or prove, we cannot be sufficiently certain that the efficient transfer will occur under a Property or Liability rule.

Distributive concerns are central to the use of Mandatory Transfer rules. Mandatory Transfer rules, like Liability rules, allow the monetary value of the entitlement to be allocated to the distributively-favored party while making in-kind use readily available (for a price) to the efficient party. In fact, the only reason for instituting a policy of mandatory transfer (rather than simply allocating in-kind use to the efficient party directly) is to allocate the monetary value to the distributively-favored party. Since, under the Mandatory Transfer rule, compensated transfer is required regardless of the preferences of either party, the required compensated transfer might, in any given case, be advantageous to either, neither, or both parties.

All of the entitlement forms considered thus far permit the in-kind holder to receive compensation for transferring the in-kind enjoyment component. By varying the posture of the veto power and

¹⁰⁷ Subcomm. on Financial Institutions Supervision, Regulation and Insurance, Committee on Banking, Finance and Urban Affairs, House of Representatives, Report to the Chairman, Bank Supervision[:.] Prompt and Forceful Regulatory Actions Needed 42 (Comm. Print 1991) (GAO/GGD-91-69, April 15, 1991).

initiation choice components while holding constant the posture of the monetary compensation component, we have identified five distinct entitlement forms that have significantly different efficiency and distributive characteristics. As has been discussed, those differing characteristics make each of the entitlement forms particularly valuable for use in particular types of legal contexts.¹⁰⁸

¹⁰⁸ Before moving on to discuss the rules that preclude or prohibit compensated transfers, it is worth noting that any of the five compensated transfer rules can be modified by a "no-gift" constraint prohibiting uncompensated transfers of the in-kind component and/or by a minimum-price constraint under which the collectively-set minimum price is the lowest price at which transfer may legitimately occur. No-gift and minimum-price constraints are qualifications of the monetary compensation component of an entitlement. Coleman and Kraus have discussed what is, in effect, a no-gift/minimum-price version of a Liability rule. See Coleman & Kraus, *supra* note 51, at 1347-52. No-gift/minimum-price versions of the other compensated transfer rules also could be constructed.

No-gift/minimum-price constraints are useful where a third party interest in the in-kind component would be harmed by the gift or discount-priced sale of the in-kind component. Susan Rose-Ackerman, noting the existence of rules permitting sale at market price but prohibiting discount sale or gift, calls such rules "modified property rules." Rose-Ackerman, *supra* note 29, at 935. Rose-Ackerman states:

[M]odified property rules have been imposed on people who are either insolvent or about to die. In both cases, these rules solve problems that arise because someone with an interest in the property has no formal legal claim until some event, i.e., bankruptcy or death, occurs. . . . The modified property rule is a second-best way of recognizing the property interests of creditors, heirs, and tax collectors in situations where the nominal owner may choose to overlook their claims.

Id. at 949-50. I would add to Rose-Ackerman's observations that implicated third party interests can be protected by modifying *any* of the five compensated transfer rules (not only Property rules) with a no-gift/minimum-price constraint.

No-gift/minimum-price constraints also are useful in certain other circumstances. By setting a minimum level of compensation for transfer of the in-kind use component, we preclude the possibility that the entitled party would underestimate the value (to him or herself or, in certain instances, to relevant third parties) of the in-kind component and therefore sell at "too low" a price. See Coleman & Kraus, *supra* note 51, at 1349 n.20. Such underpricing would be undesirable for efficiency purposes because it is only if the price of transfer accurately reflects the value of the in-kind use component to its various potential holders that the market will function to allocate the in-kind use component to its highest value use. We might also wish to preclude underpricing for distributional purposes. The set minimum price would prevent underpricing by in-kind holders and reduce the effects of price competition between in-kind holders who might otherwise bid down the price of the in-kind use component.

Coleman and Kraus suggest that an additional benefit of prohibiting negotiated transfer of the in-kind component is that we thereby prevent the conflicting party from eliminating her potential tort liability. See *id.* at 1349. That suggestion is inaccurate, however, because transfer of the monetary compensation component, not the in-kind component, would eliminate potential tort liability. For example, I eliminate my potential tort liability not by buying your leg (the in-kind component), but by purchasing your entitlement to compensation (the monetary compensation component) for any future damage that I might cause to your leg. See *infra* notes 109-117 and accompanying text (discussing sales of the monetary compensation component).

B. Having It Both Ways: Entitlement Forms Where the Conflicting Party Holds a Monetary Compensation Component

Up until this point, this Article has focused on those entitlement forms in which the in-kind holder alone holds the monetary compensation component—that is, in which the in-kind holder is entitled to compensation for transferring in-kind enjoyment. But that intuitively attractive arrangement is not the only possible allocation of the monetary compensation component. We move now to the entitlement forms (represented in cells five through twelve) in which the monetary component is held by the conflicting party or by the two parties together. This allocation of the monetary compensation component, although counterintuitive, can produce highly desirable efficiency and distributive effects in certain circumstances. The Transferred Claim and Transferred Claim With Deductible rules (cells six and ten) and the Transferred Claim Without Refusal and Transferred Claim With Deductible Without Refusal rules (cells eight and twelve) will be considered first, followed by the “incoherent” forms (cells five, seven, nine, and eleven).

1. *The Transferred Claim Rule*

The Transferred Claim rule (cell six) would appear at first to be a peculiar entitlement form. Party *A*, the in-kind holder, holds *only* the in-kind component. Party *B*, the conflicting party, holds the only veto power and also holds the monetary compensation component. That at first glance seems rather odd, if not impossible. How can Party *B*, who does not hold the in-kind component, be entitled to compensation for transfer of the in-kind component? The answer is that Party *B* has bought the monetary compensation component from the in-kind holder. To form a Transferred Claim rule, Party *B* would buy from Party *A* her entitlement to compensation for relinquishment of the in-kind component.

An example of a Transferred Claim rule is a collision damage waiver. When I buy a collision damage waiver when renting a car, I purchase from the rental company the monetary compensation component of the entitlement to its car for the period of the waiver. I have thus bought any future claim the company might have against me for compensation for accidental collision damage occurring during the period of the waiver.¹⁰⁹

¹⁰⁹ See 1986 Op. Att’y Gen. N.Y. 32 (“[T]he lessor becomes obligated at the time of [entering into] the CDW [collision damage waiver] agreement to waive any right to recover from the lessee in the event of damage to the rented car.”).

More precisely, when I rent a car I procure a Property rule entitlement to the car, vis-à-vis the rental company (only), for a limited period of time. I lease the in-kind use

To further clarify the relationship between the two parties under a Transferred Claim rule, it will be helpful first to consider a case involving a third party, and then move back to the two-party case. Sheldon routinely (and legally) engages in behavior that risks injury to Gladys. Gladys will be entitled to monetary compensation from Sheldon if injury does occur. Arlene purchases from Gladys any future claims to monetary compensation for injury by Sheldon. Now, if Sheldon injures Gladys, the monetary compensation will go to Arlene. Arlene has thus purchased from Gladys the monetary compensation component of her entitlement to freedom from tortious injury by Sheldon.¹¹⁰

We can now return to the two-party case. Here, the third party, Arlene, is not involved. Rather, Sheldon purchases from Gladys any future claims that Gladys might have against Sheldon himself for tortious injury. In this two-party case, Sheldon, Party *B*, has purchased from Gladys, Party *A*, the monetary component of her entitlement to freedom from tortious injury by Sheldon. Thus Sheldon, if he injures Gladys, will stand both as the injurer and as the holder of the monetary compensation component. In sum, whenever a Transferred Claim rule exists, we know something about the history of the relationship between the two parties: Party *B*, the conflicting party, has bought the monetary compensation component from Party *A*, the in-kind holder.

Transferred Claim rules would necessarily be limited to apply only to unintentional transfers of the in-kind component, such as

component for the period of the rental. During that period, I also hold veto power, that is, I can decline to transfer in-kind use back to the rental company during the period of the rental agreement. I also hold the monetary compensation component: I could demand monetary compensation in return for relinquishing in-kind use to the rental company prior to the expiration of the rental contract. The Transferred Claim rule, by contrast, is the rule that governs my relations with the rental company when I return the car, if I have bought a collision damage waiver. At the expiration of the rental, the company is entitled to in-kind use. If I have damaged the car, however, then I cannot render to the company the unimpaired in-kind enjoyment to which it is entitled. The company holds no veto power: I am permitted to return the car damaged if I have exercised due care to avoid damage. The company ordinarily would have a claim to monetary compensation for the damage (the impairment of its in-kind use of the vehicle). In this case, however, the company has no claim to monetary compensation because I have previously purchased the monetary compensation component from the company by purchasing the collision damage waiver.

For a discussion of the possibilities for selling compensation claims to second and third parties, see Robert Cooter, *Towards a Market in Unmatured Tort Claims*, 75 VA. L. REV. 383 (1989); see also Charles J. Goetz, *Commentary on "Towards a Market in Unmatured Tort Claims": Collateral Implications*, 75 VA. L. REV. 413 (1989) (commenting on Cooter article); Alan Schwartz, *Commentary on "Towards A Market in Unmatured Tort Claims": A Long Way Yet to Go*, 75 VA. L. REV. 423 (1989) (same).

¹¹⁰ A variation on this arrangement is where Arlene purchases Gladys's claim after Sheldon has already injured Gladys but before the damage award has been set.

accidental automobile collisions. If *intentional* transfers were permitted under Transferred Claim rules, then purchasing the monetary compensation component would entitle the conflicting party to *take* the in-kind component at will. Under such an arrangement, buying the monetary compensation component would mean, in effect, buying both the monetary compensation component and the in-kind use component.

Transferred Claim rules promote efficiency in two ways. First, Transferred Claim rules, under certain circumstances, promote efficiency by substituting first party insurance for more expensive third party insurance. As Robert Cooter argues, "the market for UTCs [unmatured tort claims] may . . . be . . . a superior vehicle for achieving tort law's two proclaimed goals—deterrence and insurance. If a market in UTCs were established . . . , potential victims would substitute cheaper first party insurance for the tort system's current third party insurance scheme."¹¹¹

Second, Transferred Claim rules may promote efficiency by giving potential tort victims increased asset liquidity. As Alan Schwartz has observed,

Before [a reform permitting widespread sale of UTCs], potential victims own nothing of value regarding a possible accident; were the reform enacted, they would own a UTC that could be turned into cash. Removing the legal barrier to the sale of tort claims thus creates gains for potential victims that are not offset by losses elsewhere. [The] proposed reform therefore is efficient.¹¹²

The case for the efficiency of Transferred Claim rules is clearest where inherent or collateral deterrents—deterrents other than the prospect of tort liability—operate as incentives to avoid transfers of the in-kind use component. For instance, even though I have bought a collision damage waiver for my rental car, I still have strong incentives to avoid a crash. By contrast, where deterrents to transfer are *insufficient* absent the prospect of tort liability (e.g., I am deciding which safety devices to install in my factory), Transferred Claim rules threaten to *reduce* efficiency through insufficient deterrence.¹¹³

¹¹¹ Cooter, *supra* note 109, at 387-88.

¹¹² Schwartz, *supra* note 109, at 425.

¹¹³ Robert Cooter responds to the insufficient deterrence problem by arguing that a competitive market in UTCs would lead potential tortfeasors to undertake the appropriate precautionary measures. A market in UTCs would be competitive, Cooter argues, because not only the potential tortfeasor but also third parties would be permitted to buy UTCs from potential victims. The competitive market for UTCs would be sensitive to the risks of particular potential victims. Therefore, UTCs from high risk potential victims would cost more than UTCs from low risk potential victims. For that reason, if I plan to buy UTCs from my potential victims, I would seek to keep their risks low so that their UTC prices would be low. As Cooter states, "competitive pricing of UTCs would

In addition to the problems of underdeterrence that may undermine the efficiency of Transferred Claim rules in some circumstances, problems of underpricing also may threaten to render Transferred Claim rules inefficient in some contexts. Such underpricing problems would arise because people in some situations may undervalue their UTCs. Such undervaluation would arise in contexts involving information imbalances (in which buyers know more than sellers about the true value of UTCs) or involving irrational discounting of UTCs by sellers (i.e., irrational underestimation of the probability and severity of potential future injuries to oneself).¹¹⁴

In sum, underdeterrence and underpricing may limit the efficiency potential of Transferred Claim rules in some but not all circumstances. Where Transferred Claim rules operate optimally, they may promote efficiency both by replacing costly third-party insurance systems with cheaper first-party systems and by providing increased liquidity of assets for potential tort victims.

Transferred Claim rules distribute less wealth to the in-kind holder and more to the conflicting party than would any of the com-

result in appropriate deterrence of potential tortfeasors. Because the price of UTCs should vary according to the likelihood and severity of potential torts, the potential tortfeasor faced with purchasing the UTC or risking litigation should take the optimal amount of precaution." Cooter, *supra* note 109, at 387 (footnote omitted). That response by Cooter has not fully satisfied all critics. See, e.g., Goetz, *supra* note 109, at 415-16. Indeed, Cooter acknowledges that further work on this problem may be warranted. Cooter, *supra* note 109, at 404.

Without wading further into the debate, suffice it to say that, even if the insufficient deterrence problem may narrow the range of cases in which Transferred Claim rules will foster efficiency, there will be at least some cases remaining where inherent and collateral deterrents and/or competitive market factors will be sufficient to induce an efficient level of precaution. Where those factors promoting due caution are sufficient, Transferred Claim rules may promote efficiency. The rental car collision damage waiver appears to be one example of such a case.

¹¹⁴ In response to the underpricing problem, Robert Cooter argues that a competitive market in UTCs would result in appropriate UTC pricing, even in the presence of information imbalances or irrational discounting by sellers. The supply and demand for UTCs, Cooter maintains, would result in an equilibrium price for UTCs that would reflect their true value—that is, the value of the potential tort claims themselves (appropriately discounted for time value, transaction costs, and the like). As Cooter states, "In a brisk market for UTCs, interested classes of buyers, such as insurers and law firms, should bid up the price of undervalued UTCs until they accurately reflect the expected value of the underlying claims." Cooter, *supra* note 109, at 401.

Again, the critics are not fully satisfied with Cooter's response to the problem. See, e.g., Schwartz, *supra* note 109. It may be that, in some circumstances, underpricing problems will render Transferred Claim rules inefficient. For present purposes, however, what is relevant is that, in at least some situations (e.g., an adequately competitive market, or a transaction involving a well-informed and rational seller), pricing will be appropriate and Transferred Claim rules will foster efficiency. Again, the rental car collision damage waiver is one example. No doubt rental companies are fully informed about the probability and severity of collision damage to their cars and would not be expected to discount irrationally the value of such potential damage.

pensated transfer rules precisely because, under a Transferred Claim rule, the in-kind holder is not entitled to compensation in the event of an unintentional transfer of the in-kind component. Of course, as they are generally conceived and as they have been discussed in this Article, Transferred Claim rules would come into being as a result of a *compensated* transfer to the conflicting party of a monetary compensation component initially held by the in-kind holder.¹¹⁵ The fair market price for that monetary compensation component should equal the discounted value of the potential tort claim.¹¹⁶ Thus, while an *existing* Transferred Claim rule distributes less wealth to the in-kind holder than would any of the regular compensated transfer rules, for a new Transferred Claim rule to *come into* existence, the in-kind holder must receive (or at least be entitled to receive) compensation approximating the difference in value between a Transferred Claim rule and a Liability rule.

2. *The Transferred Claim With Deductible Rule*

The Transferred Claim With Deductible rule (cell ten) is in all respects the same as the Transferred Claim rule except that in the former, only part, rather than all, of the monetary compensation component has been purchased by Party *B*. Under the Transferred Claim With Deductible rule, Party *A* holds the in-kind use component, Party *B* holds the only veto, and both *A* and *B* hold portions of the monetary compensation component. In other words, only part of the claim to monetary compensation has been transferred from Party *A* to Party *B*.

Returning to the rental car example, a Transferred Claim With Deductible rule would apply if, rather than purchasing a collision damage waiver freeing me from *all* obligation to compensate for collision (a Transferred Claim rule), I purchased a collision damage waiver with a "deductible"—a portion of the full compensation value for which I would remain obligated. If, having purchased a collision damage waiver with a \$250 deductible, I did \$1000 of collision damage to the rental car, then I would owe \$250 compensation to the rental company (representing the \$250 portion of the monetary compensation component that the company retained). I would not owe the company compensation for the remaining \$750 of damage because I had purchased, in the collision damage waiver, the portion of the monetary compensation component relating to all damage in excess of \$250.

¹¹⁵ See, e.g., Cooter, *supra* note 109; Goetz, *supra* note 109; Schwartz, *supra* note 109.

¹¹⁶ See *supra* note 114 and accompanying text.

Transferred Claim With Deductible rules promote efficiency in the same ways as regular Transferred Claim rules, by substituting first-party insurance for more expensive third-party insurance and/or by increasing asset liquidity of potential tort victims. Transferred Claim With Deductible rules also provide, in the form of the deductible, an incentive for Party *B* to avoid damage to the in-kind component. In contexts in which inherent and collateral deterrents are not sufficient to induce an efficient level of precaution in the absence of tort liability, liability for the deductible may in some circumstances provide the necessary added deterrent to induce Party *B* to take an efficient level of care. Using the rental car example, inherent deterrents (my regard for my own safety) may cause me to take due care to avoid a crash, but they may not induce me to take sufficient care to avoid, say, body damage to the rental car resulting from falling debris at a construction site. My knowledge that I will pay for the first \$250 of any damage to the car, however, may induce me to take an efficient level of precaution, perhaps by parking outside the construction zone.

The Transferred Claim With Deductible rule may be seen as a hybrid between the plain Transferred Claim rule (where Party *B* may force a transfer for which Party *A* receives no compensation) and the Liability rule (where *B* may force a transfer for which *A* receives full compensation). The Transferred Claim With Deductible rule does not, like the Liability rule, ensure the deterrence of all but efficient transfers by setting the compensation requirement at the full value of the in-kind component, as determined by a court. It does, however, provide some deterrence to transfer that in some circumstances, when combined with inherent and collateral deterrents, may be sufficient to induce efficient levels of precaution.

The distributive effects of the Transferred Claim With Deductible rule are mixed. By splitting the monetary compensation component, this rule distributes more wealth to the in-kind holder than would a plain Transferred Claim rule, under which the in-kind holder is entitled to no monetary compensation for transfer of the in-kind component. By the same token, the price that the in-kind holder would receive for the transfer of a *portion* of the monetary compensation component to create a Transferred Claim With Deductible rule would presumably be a lower price than the in-kind holder would receive for selling the *full* monetary component to create a plain Transferred Claim rule.

3. *The Transferred Claim Without Refusal Rule*

As was true under the Transferred Claim rule (cell six), under the Transferred Claim Without Refusal rule (cell eight), Party *A*

holds the in-kind enjoyment component and Party *B* holds the monetary compensation component. The difference between the Transferred Claim and the Transferred Claim Without Refusal entitlement forms is that, under the former, Party *B* holds the only veto power, while under the latter, neither party holds veto power. This difference means that, while only Party *B* could force a transfer under a Transferred Claim rule, *either* party can force a transfer of the in-kind component from *A* to *B* under a Transferred Claim Without Refusal rule.

The Transferred Claim rule and the Transferred Claim Without Refusal rule function equivalently except where Party *A*, the in-kind holder, wishes to force an uncompensated transfer.¹¹⁷ A Transferred Claim Without Refusal rule would allow *A* to force an uncompensated transfer of the in-kind enjoyment component even against the wishes of Party *B*, since under this rule *B* holds no veto. To return to the rental car example, if I purchased a collision damage waiver constituted as a Transferred Claim Without Refusal rule (rather than as the usual Transferred Claim rule), then the rental company could effect an uncompensated transfer of the in-kind component to me whether I wanted it or not. Presumably, the rental company would have little desire to give away cars in working order. However, if I damaged the car beyond repair, then the rental company might want to transfer the car to me for disposal.

To put the point differently, imagine that, by having a traffic accident, I unintentionally transfer ninety percent of the in-kind use component of the rental car from the rental company to myself; the remaining ten percent is the car's carcass, scrap metal. Under a plain Transferred Claim rule, I return the remaining ten percent of the in-kind component to the rental company. (That is, since I may transfer only unintentionally, I must return the ten percent of the in-kind component that is left after the accident; and since I hold veto power, the company cannot force me to take the junk heap.) By contrast, under a Transferred Claim Without Refusal rule, the rental company can force an uncompensated transfer to me of the remaining ten percent of the in-kind use component, resulting in a final one hundred percent of the in-kind component being transferred to me.

Presumably, in-kind holders would force uncompensated transfers only in situations, such as the rental car example, in which part

¹¹⁷ I use the term "uncompensated" loosely here and throughout the discussions of the various transferred claim entitlement forms. To be more precise, Party *B*, as both the transferee and the holder of the monetary compensation component, would be both the payor and the recipient of the compensation for Party *A*'s relinquishment of the in-kind use.

of the in-kind component has already been transferred and the residuum of the in-kind component has negative value (for instance, merely represents a disposal cost). Thus, under a Transferred Claim Without Refusal rule, Party *B* could unintentionally force an uncompensated transfer (as in an accident), while Party *A* could intentionally force an uncompensated transfer (as in the disposal example).

The Transferred Claim Without Refusal rule would promote efficiency in certain ways that the plain Transferred Claim rule would not. Under the Transferred Claim Without Refusal rule, the in-kind holder (the rental company) presumably would not force an uncompensated transfer unless the conflicting party had already transferred (through, say, collision damage) such a large part of the in-kind use component that the remainder of the in-kind component represented a net cost to its holder (a disposal cost for the wrecked car, for example, that outweighed the value of what was left of the in-kind component). The prospect of having disposal costs transferred to the conflicting party would provide an incentive for that party to take efficient levels of precaution to avoid damage and to minimize potential disposal costs.

The distributive implications of a Transferred Claim Without Refusal rule are the same as those of a Transferred Claim rule, except for the no-refusal aspect. That is, the Transferred Claim Without Refusal rule distributively favors Party *B* insofar as *B* is free from liability for monetary compensation. And, as under the plain Transferred Claim rule, we may assume that Party *B* previously paid Party *A* for the transfer of that monetary compensation component. The distributive implications of the plain and "Without Refusal" Transferred Claim rules differ, however, with regard to the no-refusal aspect. Under the Without-Refusal rule, Party *A*, the in-kind holder, can force an uncompensated transfer of the in-kind component to Party *B*. Party *A* can thus transfer disposal costs to Party *B*. Again, the rental company may transfer the wrecked car to me. That no-refusal feature is distributively disadvantageous to Party *B*. Party *B* presumably would therefore pay less to Party *A* to create a Transferred Claim Without Refusal rule than to create a plain Transferred Claim rule.

4. *The Transferred Claim With Deductible Without Refusal Rule*

The Transferred Claim With Deductible Without Refusal rule (cell twelve) is simply an amalgam of the foregoing three rules. It is identical to the Transferred Claim Without Refusal rule except that, under the Transferred Claim Without Refusal *With Deductible* rule,

only part, rather than all, of the monetary compensation component has been transferred from Party *A* to Party *B*.

The Transferred Claim With Deductible Without Refusal rule combines the efficiency and distributive characteristics of the Transferred Claim With Deductible and the Transferred Claim Without Refusal rules. The Transferred Claim With Deductible Without Refusal rule promotes efficiency in several ways. Like all transferred claim rules, it substitutes first-party insurance for expensive third-party insurance, and increases asset liquidity of potential tort victims. In addition, it provides dual incentives for Party *B* to avoid transfers of the in-kind component by leaving *B* liable for payment of a deductible (the With Deductible aspect), and allowing Party *A* to transfer disposal costs to Party *B* (the Without Refusal aspect).¹¹⁸

The Transferred Claim With Deductible Without Refusal rule is, in two ways, more distributively favorable to the in-kind holder than the plain Transferred Claim rule. First, the "With Deductible" aspect entitles the in-kind holder to partial compensation, rather

¹¹⁸ The presence of the deductible in the Transferred Claim With Deductible Without Refusal rule would not be expected to affect the incidence of forced transfers by in-kind holders. A deductible (using the term "deductible" broadly, to indicate any arrangement in which each party holds part of the monetary compensation component) may take one of three forms. The first type of deductible is a co-payment structure. Here, Party *B* pays to Party *A* some constant proportion of the value of the in-kind transfer—a co-payment. For instance, Party *B* could owe the in-kind holder 20% of the value of any impairment (transfer) *B* causes to the in-kind use component. Under this first design, the in-kind holder would not be expected to force transfers under ordinary circumstances because she would always receive only partial compensation, some percentage of the value of the transfer.

Under the second deductible design, Party *B* would owe Party *A* no compensation for transfers of the in-kind component unless and until the value of the transfer (impairment or damage) reached a certain level. Once that level were reached, *B* would pay *A* the remaining value of the transfer. This design would operate as a cap on the potential damage by Party *B* that Party *A* would be vulnerable to without compensation. Under this second deductible design, the in-kind holder would not be expected to force transfer under ordinary circumstances because the in-kind holder would receive either no compensation (if the cap on the in-kind holder's vulnerability were not reached) or only partial compensation (the in-kind holder would begin to receive compensation only after sustaining some amount of uncompensated loss).

The third deductible design represents the most common meaning of a "deductible." Here, Party *B* owes Party *A* compensation for transfer value up to a set amount and owes *A* no compensation for any transferred value above that amount. For example, I owe the rental company only the first \$250 worth of damage that I do to its rental car. Under this third deductible design, an in-kind holder would be expected to force a transfer only if she could limit the value of the transfer to an amount less than the deductible amount and she expected a discrepancy in her favor to arise between the true value and the appraised value of the transfer. That is, the in-kind holder would not be expected to force a transfer unless she foresaw an error in the appraisal of the value transferred that would result in overcompensation of her loss from the deductible funds. In the absence of such a circumstance, the presence of the deductible would not be expected to affect the propensity of in-kind holders to force transfers under the Transferred Claim With Deductible Without Refusal rule.

than no compensation. Second, the "Without Refusal" aspect allows the in-kind holder to transfer disposal costs to Party *B*. By the same token, we would expect the *initial* bargain between the parties to reflect these distributive advantages: Party *B* would pay Party *A* less money to *create* the Transferred Claim With Deductible Without Refusal rule than she would pay to create another type of transferred claim rule.

Exploration of the four varieties of transferred claim rules—the rules in which the monetary compensation component is held, in full or in part, by the conflicting party—has revealed that these seemingly odd entitlement forms may constitute the optimal structuring of legal relations in circumstances in which some incidence of unintentional transfer (accidental damage or injury) is to be expected. Under such circumstances, the four varieties of transferred claim rules may serve to minimize the costs of insurance and to increase the liquidity of potential victims' assets, while also providing a range of incentives for actors to take efficient levels of precaution.

5. *The Incoherent Cells*

Cells five, seven, nine, and eleven are incoherent. In cell five, Party *A*, the in-kind holder, holds a veto and Party *B* holds the monetary compensation component. Cell nine is the same except that the two parties together hold the monetary component. In cell seven, Party *A* again holds the in-kind component, Party *B* holds the monetary compensation component, and both parties hold veto power. Cell eleven is the same as cell seven except, again, that the two parties together hold the monetary compensation component.

None of these component combinations produce a coherent entitlement form. The monetary compensation component of an entitlement cannot be allocated—in full or in part—to the conflicting party if the in-kind holder also holds veto power. This is so because, as we have seen, Party *B* can obtain the monetary compensation component only by purchasing it from the in-kind holder. By purchasing part or all of the monetary compensation component, Party *B* becomes entitled to part or all of the monetary compensation to which the in-kind holder would otherwise have been entitled in the event of relinquishment (or impairment) of the in-kind component. If Party *A*, who has sold all or part of the monetary compensation component, can then veto relinquishment of the in-kind component, then presumably, *A* will always veto transfer (as long as the in-kind component retains some positive value). This is so because, under these circumstances, *A* stands only to lose in-kind use without equivalent compensation, since she is entitled to either no compensation or only partial compensation, by permitting the trans-

fer.¹¹⁹ If Party *A* vetoes every, or virtually every, potential transfer, then Party *B*'s holding of the monetary compensation component is meaningless. Thus, Party *B* can meaningfully hold the monetary compensation component only if Party *A* holds no veto.¹²⁰

C. Not for Love of Money: The Entitlement Forms Precluding Compensation

As we have seen, entitlement forms that allocate the monetary compensation component to the in-kind holder as well as the intuitively less obvious entitlement forms that allocate the monetary component partly or fully to the conflicting party can foster efficiency and distributive goals when applied in appropriate contexts. We move now to the final set of entitlement forms, represented in cells thirteen through sixteen, in which neither party holds a monetary compensation component. Under these rules, no *compensated* transfer of the in-kind component may occur.

These entitlement forms that prohibit compensated transfer are valuable in contexts where the potential exchange of money would exert an undue or inappropriate influence on transfer decisions. They are also beneficial in contexts where compensation is not distributively desirable. Ease of exposition requires addressing this set of entitlement forms in a different order from that in which they appear on the table. The Uncompensated Taking rule will be considered first, followed by the Full Inalienability, Market Inalienability With Refusal, Market Inalienability Without Refusal, and Combined Uncompensated Taking and Market Inalienability Without Refusal rules.

1. *The Uncompensated Taking Rule*

The Uncompensated Taking rule (cell fourteen) is perhaps the most counterintuitive entitlement form of all, and yet it is widely used. Under this rule, Party *A* holds only the in-kind component. Party *B* holds the sole veto power, and neither party holds a monetary component. Thus, Party *B* can force a transfer of the in-kind

¹¹⁹ It is true that Party *A* could refrain from vetoing the transfer as a way of giving a gift to Party *B*. That is, *A*, by not vetoing relinquishment, could allow *B* to collect monetary compensation. But in situations where Party *A* wishes to make a gift to Party *B*, it is unlikely that *B* would have purchased the monetary compensation component from *A* at the outset rather than simply allowing Party *A* to make a gift directly to Party *B*.

¹²⁰ For the reasons stated, cells five, seven, nine, and eleven appear to be incoherent. It is possible, however, that the component distributions in those cells do represent coherent entitlement forms that I have failed to identify. My colleague, Tom Rowe, has helped me to make sense of several transferred-claim entitlement forms that at first appeared incoherent. It would not be surprising if better sense could eventually be made of the component distributions in cells five, seven, nine, and eleven as well.

enjoyment component from Party *A*, who lacks veto power, without paying him compensation (since no monetary compensation component exists). The Uncompensated Taking rule is like the Liability and Transferred Claim rules insofar as, under all three rules, the conflicting party holds the only veto power and may therefore force a transfer of the in-kind component. Under the Uncompensated Taking rule, however, that forced transfer is uncompensated since neither party holds a monetary compensation component. By contrast, under the Liability rule, the transfer is compensated since the in-kind holder holds the monetary component. And under the Transferred Claim rule also, the transfer is "compensated," although the compensation does not go to the in-kind holder.¹²¹

Although it may not appear so at first blush, the Uncompensated Taking rule is a form of entitlement. It is distinguished from a non-entitlement by the fact that Party *A* does hold the in-kind enjoyment component. Of course, since Party *A* does not hold a veto or a monetary compensation component, Party *B* can take the in-kind use component from Party *A* without compensation. But a court will not enjoin *A*'s in-kind enjoyment—unless and until *B* has transferred the in-kind component. Party *A*'s entitlement thus consists precisely in legal permission to enjoy in-kind use, but without any guarantee of non-transfer by Party *B*. The Uncompensated Taking rule is, thus, a thin form of entitlement, to be sure. Nonetheless, the rule constitutes a legal liberty, distinct from a non-entitlement, insofar as, under the rule, a court will permit, if not protect, Party *A*'s in-kind use.

Since Uncompensated Taking rules provide that the conflicting party may take in-kind use without paying compensation, it is not surprising that these rules are used only in narrowly defined circumstances. The two contexts in which Uncompensated Taking rules are generally found are: confiscation-for-cause and non-negligent injury.

An example of an Uncompensated Taking rule designed to provide for confiscation-for-cause is a criminal forfeiture provision. Various criminal statutes provide for the confiscation of property

¹²¹ Even though the compensation money would not go to the in-kind holder under the Transferred Claim rule, the Uncompensated Taking entitlement form is to be distinguished from the Transferred Claim rule. Under a Transferred Claim rule, Party *B* actually holds the monetary component. After Sheldon has purchased from Gladys any future tort claims she may have against him (by purchasing her monetary compensation component), Sheldon, theoretically, may sell that monetary component back to Gladys or to a third party who will now receive any future tort damages awarded to Gladys against Sheldon. This situation is entirely distinct from what would obtain under an Uncompensated Taking rule in which no monetary compensation component is held by any party.

used in the commission of a crime. Florida law, for example, provides that any equipment used to poach alligators will be confiscated.¹²² Thus, under Florida law, when a person is convicted of alligator poaching, she loses the power to veto transfer of in-kind use of implicated equipment, and she loses any claim to monetary compensation for relinquishing in-kind use. The state may force an uncompensated transfer¹²³ under these circumstances.

Another example of an Uncompensated Taking rule designed to provide for confiscation-for-cause is the rule governing involuntary termination of parental custody for lack of parental fitness. Ordinarily, custody is governed by a Market Inalienability With Refusal rule:¹²⁴ the parent may give, but may not sell, custody to a willing taker. However, if the condition of parental unfitness occurs, then the Uncompensated Taking rule governs. That is, upon a finding of unfitness, the custodian loses the power to veto a transfer of in-kind enjoyment of custody.¹²⁵ The unfit parent thus holds the in-kind component, but no veto power or monetary compensation component. Therefore, the government may, at its discretion, force an uncompensated transfer of custody.¹²⁶

The second and somewhat broader context in which Uncompensated Taking rules are found is non-negligent injury.¹²⁷ If you unintentionally injure me even though you were exercising all due and reasonable care, then (assuming that you are not strictly liable) you owe me no compensation. If you are permitted to thus unintentionally and non-negligently injure me (impair my in-kind enjoyment of, say, my health) without my consent (I hold no veto), but you owe me no compensation (I hold no monetary compensation component), then my health entitlement, under these limited condi-

122 The statute provides:

It is unlawful to intentionally kill . . . an alligator Any person who violates this section is guilty of a felony Any equipment, including but not limited to weapons, vehicles, boats, and lines, used by a person in the commission of a violation . . . shall, upon conviction of such person, be confiscated

FLA. STAT. ANN. § 372.663(1) (West Supp. 1993); *see also* WASH. REV. CODE ANN. § 77.12.101(1) (West Supp. 1993) (providing for forfeiture of contraband wildlife and related equipment).

123 I say "may force" rather than "must force" because I assume that there is prosecutorial discretion in the enforcement of the forfeiture provision.

124 The Market Inalienability With Refusal rule is discussed below. *See infra* notes 142-49 and accompanying text.

125 *See, e.g.,* Wilson v. Wilson, 153 S.E.2d 349 (N.C. 1967) (placing the child with a state agency when both parents were found unfit); *In re Douglas*, 164 N.E.2d 475 (Ohio Juv. Ct. 1959) (same).

126 The government has discretion because it holds veto power—the parent cannot force the government to take custody.

127 This category includes non-negligent injury of all kinds, including bodily injury and economic injury.

tions, is constructed as an Uncompensated Taking form of entitlement.

Uncompensated Taking rules that allow non-negligent injuries to go uncompensated apply pervasively in the realm of economic competition.¹²⁸ For example, when, by providing widgets at a lower price than I do, you take over my share of the widget market, you harm me but owe me no compensation. In that economic competition context, I am entitled only to in-kind use: the court will not enjoin my enjoyment of my market share. But I hold no veto power and no monetary compensation component. Thus, I cannot stop you from taking my market share, nor can I demand monetary compensation for market share that you do take.¹²⁹

Uncompensated Taking rules contribute to efficiency in the contexts both of non-negligent injury and of confiscation-for-cause. Uncompensated Taking rules promote efficiency in cases of non-negligent injury by allowing costs to lie where they fall. In the context of non-negligent injuries, cost-shifting increases administrative costs but has no deterrence value. Efficiency is not fostered by de-

¹²⁸ Yet another area in which Uncompensated Taking rules apply to non-negligent injuries is governmental regulation. Regulatory schemes often restrict in-kind use and thereby injure in-kind holders, but in many cases no compensation is due to those injured parties. See generally Jeb Rubenfeld, *Usings*, 102 YALE L. J. 1077 (1993) (describing American "takings" jurisprudence).

¹²⁹ An Uncompensated Taking rule thus applies in the economic competition context when market share is taken in a permitted manner. If, on the other hand, market share were to be taken in a forbidden manner, say, through predatory pricing, then a different rule (a Full Inalienability rule) would apply, and the transfer in question would be forbidden. PHILLIP AREEDA & DONALD TURNER, *ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION*, Vol. III § 711 (1978).

The Uncompensated Taking rule in some circumstances bears resemblance to a Hohfeldian privilege, but it is distinct from a Hohfeldian privilege in the following way. Under an Uncompensated Taking rule, a *transfer* of the in-kind component from Party *A* to Party *B* is contemplated. But contrast, under a Hohfeldian privilege structure, both parties have continuing legally sanctioned access to in-kind use—no transfer is involved. Thus, when a confiscation for cause occurs under an Uncompensated Taking rule (say my poaching equipment is confiscated), Party *A* no longer has any entitlement at all—the in-kind use component is now held by Party *B*, and Party *A* has no further legally sanctioned access to it. This situation is quite different from that contemplated in the Hohfeldian privilege in which both parties retain continuing legally-sanctioned access.

Once the transfer has been made, under an Uncompensated Taking rule, the question arises as to what form of entitlement the new in-kind holder has. For example, where the state confiscates my poaching equipment, it now holds that equipment under a Property rule. By contrast, when you take my market share, you hold it under an Uncompensated Taking rule (so I am free to win that market share back, if I can). The latter case, where the new in-kind holder holds under an Uncompensated Taking rule, most closely resembles the Hohfeldian privilege, since both parties are continuously permitted to attempt to avail themselves of in-kind use. But the Uncompensated Taking rule is not limited to that sort of case and, indeed, the new in-kind holder after an uncompensated transfer could hold the in-kind component under any of the fourteen entitlement forms. For a history of legal theory regarding the existence and significance of "thin" entitlements, see Singer, *supra* note 7, at 1025-59.

terrence of non-negligent behavior. Where the reasonable level of care to avoid injury is taken, it would, by definition, not be reasonable to demand a higher level of care. If the law required monetary compensation for injuries resulting from non-negligent activities, then non-negligent actors might reduce activity to inefficiently low levels to avoid liability. Where reasonable care is taken, the incidence of injury would not be inefficiently high.¹³⁰ Thus, where the actor takes reasonable care and causes injury, requiring the injurer to compensate the in-kind holder would not foster efficiency. In such cases, an Uncompensated Taking rule serves efficiency purposes.

In the confiscation-for-cause context, the Uncompensated Taking rule fosters efficiency in a different way. Here, when an in-kind holder uses the in-kind component in a prohibited manner, that in-kind component may be confiscated. The efficiency value of the Uncompensated Taking rule in the confiscation-for-cause context lies both in the fact that confiscation incapacitates the in-kind holder from further illicit use of the in-kind component, and in the deterrence of illicit use that is provided by the threat of confiscation.

The Uncompensated Taking rule obviously distributes less wealth to the in-kind holder, and more to the conflicting party, than any other entitlement form. Under this rule, the in-kind holder holds in-kind enjoyment only at the pleasure of the conflicting party, and is entitled to no compensation for relinquishing in-kind enjoyment. In addition, unlike the various transferred claim rules, the Uncompensated Taking rule does not imply a previous compensated transfer of the monetary compensation component.

Considerations of distributive justice may militate against use of Uncompensated Taking rules in some contexts. For example, where two non-negligent actors are involved in a situation resulting in injury to one, it may be unfair to let all the costs of injury lie where they fall. By contrast, in the confiscation-for-cause context, the distributive disadvantage to the in-kind holder is better justified since the confiscation is, after all, for cause.

Thus we see that an entitlement form even as peculiar and thin as the Uncompensated Taking rule may actually be a valuable structure for legal relations in a certain range of contexts. Where a socially desirable activity will predictably result in some rate of non-negligent injuries, or where an in-kind holder handles the in-kind component in a prohibited manner, use of the Uncompensated Taking rule may best serve efficiency and distributive goals.

¹³⁰ See generally GUIDO CALABRESI, *THE COSTS OF ACCIDENTS* (1970) (discussing theoretical bases of tort law).

2. *The Market Inalienability With Refusal Rule and the Full Inalienability Rule*

Remaining within the set of entitlement forms that precludes compensated transfers, we now leave the Uncompensated Taking rule and proceed to consider the entitlement forms that permit uncompensated transfers only with the consent of the in-kind holder, and the entitlement form that allows no transfers at all, compensated or otherwise.

Cell fifteen represents two possible rules. The Market Inalienability With Refusal rule (fifteen I) assumes that both parties have initiation choice. The Full Inalienability rule (fifteen II) assumes that, while both parties have repose power, neither party has initiation power. For ease of exposition, Full Inalienability (fifteen II) will be addressed before Market Inalienability With Refusal (fifteen I).

a. *The Full Inalienability Rule*

The Full Inalienability rule (fifteen II) is distinguished from all other entitlement forms by the fact that this rule prohibits any transfer, compensated or otherwise, of the in-kind use component. Under the Full Inalienability rule, Party *A* holds the in-kind component, neither party holds the monetary component, each party holds a veto power,¹³¹ and neither party holds initiation choice (since neither party may initiate transfer). Examples of this rule include the prohibitions against transferring one's vote in a federal election¹³² and against selling oneself into slavery.¹³³

Where a particular transfer would create costs to third parties (externalities) that exceed the value of the transfer itself, prohibiting the transfer through use of a Full Inalienability rule may foster efficiency. If a particular transfer would create costs to third parties and it is clear *a priori* that the sum required to compensate those third parties would exceed the value generated by the transfer, then simply prohibiting the transfer will be more efficient than futilely expending energy quantifying the compensation that would be owed to the third parties. In this situation, where it is clear in advance that the value of the transfer is insufficient to justify its costs including its externality costs, applying a Full Inalienability rule *ab*

¹³¹ This veto power exists in a constrained form insofar as veto is required rather than merely permitted: if one party (illegitimately) initiated a prohibited transfer of the in-kind component, the other party would have an obligation to veto that transfer.

¹³² See 18 U.S.C. § 597 (1988) (providing penalties for any person who "makes or offers to make an expenditure to any person . . . to vote for or against any candidate" or who "solicits, accepts, or receives any such expenditure in consideration of his vote").

¹³³ See U.S. CONST. amend. XIII, § 1.

initio will foster efficiency by precluding the inefficient transfer without wasting resources establishing a negotiated or collectively-set price that will never be paid.¹³⁴

Moralisms, a special type of externality, are of particular importance in the full inalienability context. A moralism is the cost in offense to the moral sensitivities of third parties caused by a transfer.¹³⁵ For instance, my knowledge that you have sold yourself into slavery may cause me pain, which constitutes an externality to your transaction with your new "owner."

Calabresi and Melamed contend that, where third-party costs are moralisms, they are not amenable to collective valuation. They maintain that, because no price may be collectively established for those third-party interests—and since, by hypothesis, transaction costs preclude individual price negotiations with the numerous third-parties—the third-party costs of moralisms must either be ignored, or else the entitlement in question must be constructed as fully inalienable.¹³⁶

It is not clear to me that the cost of a moralism could never be quantified collectively in monetary terms. But we need not resolve that question here. Rather, it suffices to say that, if a particular moralism were of sufficient weight (measured in *some* monetary or non-monetary way) to make it clear in advance that the transaction in question would be inefficient, then efficiency would be facilitated by precluding the offending transaction through use of a Full Inalienability rule. In sum, then, use of Full Inalienability rules may foster efficiency in situations where it is clear *a priori* that a transfer would be inefficient once all externalities (including moralisms) were accounted for.

In addition to promoting efficiency in some situations involving externalities, Full Inalienability rules may also be used to promote efficiency in some situations involving paternalism and self-paternalism.¹³⁷ If we believe that a particular person or class of persons (minors, for example, or persons vulnerable to coercion or, in the case of self-paternalism, oneself in a foreseeable moment of temptation) will effect a self-harmful and inefficient transfer,¹³⁸ then we

¹³⁴ Calabresi & Melamed, *supra* note 4, at 1111.

¹³⁵ *Id.* at 1112.

¹³⁶ *Id.*

¹³⁷ See Andrew Koppelman, *Forced Labor: A Thirteenth Amendment Defense of Abortion*, 84 Nw. U. L. REV. 480, 495-503 (1990) (stating that inalienability rules are appropriate where power inequalities create danger of coerced "contracts").

¹³⁸ The act in question is self-harmful *and* inefficient if the harm to self is not outweighed by a benefit to others.

may use a Full Inalienability rule to preclude the harmful transaction and thereby maximize efficiency.¹³⁹

The Full Inalienability rule generally distributes less wealth to the in-kind holder than would an entitlement form permitting compensated transfers. The in-kind holder who, under the Full Inalienability rule, may not transfer the in-kind component will be poorer than she would be were she allowed to sell in-kind use.¹⁴⁰ Full inalienability may also distribute less wealth to the in-kind holder than would an entitlement form permitting only uncompensated transfers. This would be so if the in-kind holder valued the autonomy to give away the in-kind component. On the other hand, if we were to subscribe to the paternalist thesis that in-kind holders will sometimes give away in-kind use and later regret it, then we also would believe that, in some cases, Full Inalienability rules actually distribute more wealth to the in-kind holder than would rules permitting transfer.

A midpoint between the Full Inalienability rule, prohibiting all transfers, and the entitlement forms permitting compensated transfers is the group of entitlement forms that permit only uncompensated transfers. In addition to the Uncompensated Taking rule, discussed above, this group of entitlement forms includes a variety of "market inalienability" rules, to be considered presently.

b. *The Market Inalienability With Refusal Rule*

The Market Inalienability With Refusal rule (fifteen I) is the first of the Market Inalienability rules. Under this rule, Party *A* may give, but may not sell, the in-kind use component to Party *B*. And Party *B* may refuse the gift. Under this rule, Party *A* holds the in-kind component, each party holds initiation choice and veto power, and neither party holds a monetary compensation component. This rule resembles the Property rule in that transfer can occur only with the consent of both parties (since both hold veto power). The difference between the two rules is that, while the Property rule contemplates compensated transfer, the Market Inalienability With Refusal rule contemplates only uncompensated transfer since neither party holds a monetary compensation component.¹⁴¹ An example of this

¹³⁹ It is interesting to note that, while self-paternalism may be consistent with the Coasian principle that, absent transaction costs, individuals will bargain to efficient outcomes by striking mutually advantageous bargains, true paternalism departs from that principle, by maintaining that some persons will strike bargains disadvantageous to themselves. See Calabresi & Melamed, *supra* note 4, at 1113-14.

¹⁴⁰ This assumes that the price offered would exceed the value of in-kind use to the holder.

¹⁴¹ For a valuable exploration of the significance and merits of market inalienability, see Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849 (1987).

rule is the law of most states on organ donation: I may give you, but may not sell to you, my kidney, and you may accept or decline the gift.¹⁴²

The prohibition on compensation for transfer under the Market Inalienability With Refusal rule obviously precludes operation of the most usual facilitator of efficiency, the use of negotiated prices. The use of negotiated prices that reflect the value of the in-kind component to each of these parties assures that transfers occur only where in-kind use is ultimately held by the party who most values it. Under a Market Inalienability rule, no price markers indicate the value of in-kind use to either party.

Assuming that in-kind use has some positive net value to Party *A*, the in-kind holder, any uncompensated transfer must represent an act of altruism by *A*. We may therefore predict that not every available efficient transfer will occur under this rule. Yet Market Inalienability *may* promote efficiency overall *if* some classes of in-kind holders would be excessively swayed by the prospect of receiving monetary compensation for relinquishing in-kind use, or if some compensated transfers would create externalities that uncompensated transfers would not. Thus, Market Inalienability With Refusal rules may promote efficiency in three sorts of circumstances: where paternalism or self-paternalism is a motivating factor; where we want to maximize truthfulness by in-kind holders because the in-kind holder has crucial but unverifiable information; and, where certain types of third-party moralisms exist.

Regarding paternalism, if in-kind holders, because of the momentary appeal of monetary reward, make sales they later regret (as have some individuals who have sold their kidneys, for example),¹⁴³ then those transactions may, in the long run, turn out to have been inefficient, to have created more cost than value.¹⁴⁴ In such situations, paternalism and self-paternalism toward in-kind holders may motivate market inalienability policies.

The second circumstance in which Market Inalienability With Refusal rules will promote efficiency arises when we wish to maximize truth-telling by in-kind holders because they possess crucial but non-verifiable information. Blood donation provides an exam-

¹⁴² See, e.g., CAL. PENAL CODE § 367f (West 1988); TEX. PENAL CODE ANN. § 48.02 (West 1989).

¹⁴³ See generally ROBERTA G. SIMMONS ET AL., *GIFT OF LIFE: THE SOCIAL AND PSYCHOLOGICAL IMPACT OF ORGAN TRANSPLANTATION* 233-85 (1977) (discussing the decision to become a donor).

¹⁴⁴ For an argument to this effect, see, e.g., RICHARD M. TITMUSS, *THE GIFT RELATIONSHIP: FROM HUMAN BLOOD TO SOCIAL POLICY* (1971); cf. Kenneth J. Arrow, *Gifts and Exchanges*, 1 PHIL. & PUB. AFF. 343, 355-56 (1972) (discussing Titmuss' work on this point).

ple of this sort of circumstance. Transfusion of tainted blood may result in hepatitis or Human Immunodeficiency Virus (HIV) infection in the recipient. At present, there exists no fully reliable test for determining whether the blood of a particular donor is infected with HIV or with one sort of hepatitis.¹⁴⁵ Yet the potential donor (the in-kind holder of the blood) knows whether he is infected or has engaged in behavior elevating the risk of infection. In this situation, use of a Market Inalienability With Refusal rule would be expected to reduce the incidence of transmission of HIV and hepatitis through blood transfusions. If monetary compensation were paid for blood transfers, then the in-kind holder, the only one with reliable information on the matter, would have an incentive to lie about whether his blood were or might be infected. Conversely, if no compensation were paid for blood donations, then the only remaining motive for giving blood would be altruism, in which case the in-kind holder would not be expected to lie about the likelihood that his blood were infected.¹⁴⁶ Where such informational imbalances exist, Market Inalienability With Refusal rules may foster efficient outcomes.

Of course, not all information imbalances are appropriately corrected for through Market Inalienability With Refusal rules. Susan Rose-Ackerman points out that information imbalances exist in, for example, the used car market, where sellers presumably know more about the condition and history of particular cars than do buyers.¹⁴⁷ Yet we do not solve that information imbalance problem by prohibiting compensated transfers of used cars. In the used-car context, the value of allowing compensated transfers exceeds the costs created by the attendant incentives to withhold information. Thus, market inalienability may or may not be a desirable response to an information imbalance, depending on the costs and benefits involved in a particular context.

¹⁴⁵ The available tests for HIV in blood detect the presence of HIV only where infection has occurred at least four to six weeks before the test. Therefore, to avoid collecting blood that is infected but that tests negative, blood banks must rely upon truthful answers from potential donors to questions regarding behaviors that heighten the risk of infection. Interview with Teresa Pleasants, Education Specialist for American Red Cross Blood Services, in Durham, N.C. (Nov. 21, 1991). As to hepatitis infection, reliable tests are now available for all forms of hepatitis except a subset of the cases of Non-A, Non-B hepatitis. Blood banks must rely on donor truthfulness to avoid banking blood infected with that subset of Non-A, Non-B hepatitis. See *Non-A, Non-B Hepatitis*, 2 THE LANCET 1077 (1984).

¹⁴⁶ For an empirical and theoretical comparative study of compensated and uncompensated blood banking systems, see TIRMUS, *supra* note 144; see also Arrow, *supra* note 144 (commenting on Titmuss' work).

¹⁴⁷ Rose-Ackerman, *supra* note 29, at 948.

The presence of compensation-sensitive moralisms constitutes the third circumstance in which Market Inalienability With Refusal rules may promote efficiency. A moralism, again, is the cost in offense to the moral sensitivities of third parties caused by a transfer. Some third parties may be offended by certain compensated transfers, but not offended by uncompensated transfers of the same in-kind goods. Such compensation-sensitive moralisms presumably stem from the third-party's intuition that the prospect of monetary compensation is exercising undue influence on the seller in a way that is tragic or intolerable and that perhaps is also unethical for the buyer to exploit. Such a compensation-sensitive moralism seems implicit in Richard Titmuss' statement that

[t]he commercialization of blood and donor relationships . . . results in situations in which proportionately more and more blood is supplied by the poor, the unskilled, the unemployed, Negroes and other low income groups, and categories of exploited human populations of high blood yielders. Redistribution in terms of blood and blood products from the poor to the rich appears to be one of the dominant effects of American blood-banking systems.¹⁴⁸

Where compensation-sensitive moralisms constitute externalities to compensated transfers that render those transfers inefficient (i.e., where the externality costs combined with any other costs exceed the total benefits of the transfer), Market Inalienability With Refusal rules may foster efficiency.

In sum, Market Inalienability With Refusal rules may promote efficiency in several ways. Where individual short-sightedness, information imbalances, and compensation-sensitive moralisms, alone or in combination, may render compensated transfers inefficient, a Market Inalienability With Refusal Rule may be efficiency-enhancing.

Like the Full Inalienability rule, the Market Inalienability With Refusal rule generally distributes less wealth to the in-kind holder than would a rule permitting compensated transfers. The prohibition of sale distributes wealth away from the in-kind holder if, as a result of that prohibition, she either keeps the in-kind component when she would have preferred to sell it or else gives the in-kind component to the conflicting party when she would have preferred to sell it.¹⁴⁹

¹⁴⁸ Titmuss, *supra* note 144, at 245-46.

¹⁴⁹ An example is found in the blood banking context. While Market Inalienability With Refusal rules may promote efficiency in this context, *see supra* notes 145-46, 148 and accompanying text, market inalienability may tend to distribute wealth away from the poor. While under a compensated blood-banking system, a poor individual might choose to sell his or her blood, under market inalienability, that individual would be

The only exception to the observation that a sale prohibition generally distributes wealth away from in-kind holders arises where, because of the sale prohibition, an in-kind holder declines to make a transfer that she *would* have consented to in exchange for compensation but would have later regretted. In such a case, the no-sale rule would actually distribute wealth *to* the in-kind holder by leaving her, in the long run, with the more highly valued good, rather than with the less highly valued compensation.

3. *The Market Inalienability Without Refusal Rule*

The second of the market inalienability rules, the Market Inalienability Without Refusal rule (cell thirteen), is like the Market Inalienability *With* Refusal rule, just discussed, insofar as both rules allow the in-kind holder to *give* but not to *sell* the in-kind component. The two rules differ, however, with regard to veto power. Under the Market Inalienability *Without* Refusal rule, only Party *A*, the in-kind holder, holds veto power. For that reason, under this rule, the in-kind holder can force an uncompensated transfer of the in-kind enjoyment component; Party *B* cannot refuse the "gift."

Examples of the Market Inalienability Without Refusal rule are not common. This rule, however, could be useful in contexts such as child custody. Under the law of most states, the government is not formally required to take custody of children whom parents wish to place for adoption.¹⁵⁰ But we can imagine an amendment to a state's laws that would require the state to take custody when custodians request that the state do so. Such legislation would be based on the supposition that custodians who express to the relevant state agencies their inability or unwillingness to maintain custody may, if they are forced to retain custody, be more likely than other custodians to neglect or abuse their children.¹⁵¹

It is not difficult to imagine a situation that would raise the question of giving custodians power to mandate governmental custody. Imagine, for instance, that a particular state director of social services believed that, by and large, parents—even troubled or un-

permitted to give away but not to sell his or her blood. Calabresi and Melamed illustrate this point with the example of adoption: "Prohibiting the sale of babies makes poorer those who can cheaply produce babies and richer those who through some nonmarket device get free an 'unwanted' baby." Calabresi & Melamed, *supra* note 4, at 1114.

¹⁵⁰ See, e.g., DEL. CODE ANN. tit. 13, §§ 1104, 1108 (1981 & Supp. 1992); KY. REV. STAT. ANN. §§ 625.040-.080 (Baldwin 1987). In practice, states virtually always take custody of children when requested to do so.

¹⁵¹ This fear of increased abuse and neglect rates is, presumably, one reason that states currently do take custody of children when they are asked to, even though they are not legally required to do so. Indeed, the virtual certainty in practice that a state will take custody may largely explain why no such legal obligation has been legislated; the issue has not arisen because states do not decline custody.

willing parents—are better custodians of their children than would be the state. Acting on that belief, this director of social services refused parents' requests to have the state take custody of, say, a dozen children in one year. A year later it was revealed that some of those children had been injured or had died from abuse or neglect. Under these circumstances, the state legislature might well enact legislation requiring the state, at least in certain circumstances, to take custody of children whose custodians request that it do so. Such legislation would constitute a Market Inalienability Without Refusal rule; the custodian, Party *A*, would hold the in-kind component and the only veto power, but no monetary component. Thus, the custodian could not sell in-kind custody of the child, but could give custody to the state. The state, holding no veto power, could not refuse the "gift" (the transfer of custody). Thus, the parent would hold a right to choose (without receiving compensation for either choice) between two options regarding the posture of the in-kind component: retention of custody or transfer of custody to the government.¹⁵²

The Market Inalienability Without Refusal rule may foster efficiency in certain situations in which the *With* Refusal version would not suffice. Market Inalienability Without Refusal rules would have the same benefits as Market Inalienability *With* Refusal rules insofar as both avoid the problematic incentives and attitudes that permitting compensation might generate. At the same time, the Without-Refusal variant facilitates taking into account two potentially conflicting values which must be balanced in a given situation, and allows the in-kind holder alone to strike that balance.

In the custody example, the second and potentially conflicting value (besides the value of the parent's custodial rights) is the welfare of the child. By allowing the parent to force a transfer of custody to the government, the Market Inalienability Without Refusal

¹⁵² Actually, one or both of the in-kind options available under a Market Inalienability Without Refusal rule entitlement could be treated as market inalienable. That is, one or both of the in-kind holder's options regarding the posture of the in-kind component could be permitted to be given away, but not sold. We have discussed in the custody example a Market Inalienability Without Refusal entitlement in which the prohibition on compensated transfer applies to both of the in-kind options, that is, where the holder is prohibited from accepting compensation for relinquishing either one of the mutually exclusive options regarding the posture of the in-kind component. But one can also imagine a Market Inalienability Without Refusal entitlement in which compensation is prohibited for choosing one, but not the other option. For instance, returning to the custody example, a parent might be prohibited from selling custody and yet be permitted to accept compensation in return for *retaining* in-kind custody (where, for example, the custodian's reason for enforcing her right to require the government to take custody would have been financial inability to support the child). Thus, we could construct Market Inalienability Without Refusal rules such that relinquishment of either both or only one of the in-kind options would be non-compensable.

rule obviates the risk that the child will be neglected or abused by an entitlement-holder who does not want custody but cannot transfer it. The "Without Refusal" aspect of this Market Inalienability rule assures that there will always be a party available to take custody of the child. The Market Inalienability Without Refusal rule leaves it to the in-kind holder—who presumably has the most information on the situation—to weigh the costs and benefits of retaining and of transferring the in-kind component, and to choose, without influence of compensation, between those two options.

The distributive implications of the Market Inalienability Without Refusal rule are largely the same as those of the Market Inalienability *With* Refusal rule. We may generally assume that, because both rules prohibit compensated transfer, less wealth is distributed to the in-kind holder than would be under a rule permitting compensated transfer. The only case in which that distributive assumption would not hold is where an in-kind holder, unduly swayed by the prospect of monetary compensation, would sell in-kind use but later regret it. In such a case, the paternalistic market inalienability rules would be distributively more favorable to the in-kind holder than compensated transfer rules because the former would protect the in-kind holder from impoverishing herself through poor judgment.

The distributive implications of the Market Inalienability Without Refusal rule differ from those of the *With* Refusal version insofar as the no-refusal aspect, the ability of the in-kind holder to force an uncompensated transfer, may be advantageous to the in-kind holder in some instances. Retaining the in-kind component may, for instance, entail maintenance or disposal costs. Because holding the in-kind use component may sometimes result in costs rather than benefits, the Market Inalienability Without Refusal rule distributes more wealth to the in-kind holder than does the Market Inalienability *With* Refusal rule.

4. *The Combined Uncompensated Taking and Market Inalienability Without Refusal Rule*

The Combined Uncompensated Taking and Market Inalienability Without Refusal rule (cell sixteen), the last of the fourteen forms of entitlement, combines the features of the Market Inalienability Without Refusal rule and the Uncompensated Taking rule to produce a surprisingly useful entitlement form. Under this Combined rule, Party *A* holds the in-kind component, and neither party holds a veto power or a monetary compensation component. Therefore, either party can force an uncompensated transfer.

An example of the Combined Uncompensated Taking and Market Inalienability Without Refusal rule can be readily generated by combining the custody rules described in the discussions of the Uncompensated Taking and the Market Inalienability Without Refusal rules. Under the Uncompensated Taking rule, the government may force, upon a finding of parental unfitness, an uncompensated transfer of custody from the parent to the government. The parent, however, may not force such a transfer because the government holds veto power. Under the Market Inalienability Without Refusal rule, the parent may force an uncompensated transfer of custody to the government, but the government may not force transfer because the parent holds veto power. Under the Combined rule, neither party holds veto power, and thus either party can force an uncompensated transfer of custody to the government. Either the government (upon a finding of unfitness) or the parent would be able to force an uncompensated transfer of custody to the government if custody were governed by a Combined Uncompensated Taking and Market Inalienability Without Refusal rule.

The efficiency value of the Combined Uncompensated Taking and Market Inalienability Without Refusal rule arises in contexts in which the object of the entitlement (e.g., the child, in the custody context) is an appropriate locus of societal protection. Returning to the child custody example, by allowing that either party (the parent or the government) may force an uncompensated transfer of the in-kind component (custody of the child), the probability is heightened that the welfare of the object of the entitlement (the child) will be maximized. If the government can take custody of the child upon a finding of parental unfitness, then the chances of maltreatment of the child are reduced. By the same token, if a parent can force custody upon the government, then, again, the chances of inadequate care of the child are reduced. The prohibition on compensation for the transfer removes pecuniary influences from the parties' decisionmaking processes, thereby maximizing the probability that the welfare of the child will be a prime influence.

Thus, the Combined Uncompensated Taking and Market Inalienability Without Refusal rule may be an efficient entitlement form where the overriding societal concern is for the welfare of the object of the entitlement and where that welfare is presumably maximized by allocating in-kind use to the in-kind holder but where a back-up mechanism is necessary for cases in which that presumption proves false. Of course, for the Combined rule actually to maximize the welfare of the object of the entitlement in cases where the presumption for Party *A* fails, Party *B*, who will then receive in-kind use, must be the next best in-kind holder. In sum, the Combined Uncompensated

sated Taking and Market Inalienability Without Refusal rule, by extinguishing both the monetary compensation and the veto power components, serves in some contexts to maximize the welfare of the object of the entitlement (a child, for example) by allowing either party to force a transfer, while eliminating monetary compensation as an influence on the transfer decision.

The distributive implications of the Combined Uncompensated Taking and Market Inalienability Without Refusal rule are not very favorable to the in-kind holder. As under the Uncompensated Taking rule, the in-kind holder is not assured of in-kind enjoyment and is not entitled to monetary compensation for relinquishing in-kind enjoyment. The Combined rule is, however, more favorable to the in-kind holder than the Uncompensated Taking rule insofar as the in-kind holder can, under the Combined rule, force a transfer of the in-kind component to Party *B*. The in-kind holder may value that option, particularly if holding the in-kind use component turns out to entail more costs than benefits.

Once again, then, a particular entitlement form, that is, a particular configuration of the four entitlement components, fosters efficiency and distributive goals when utilized in appropriate contexts. Familiarity with the distinct efficiency and distributive characteristics of each of the fourteen entitlement forms will enable courts, legislatures, and private legal decisionmakers to utilize the entitlement forms that structure legal relations in the ways best suited to accomplish their goals. A clear and complete understanding of the forms of entitlement will enhance the abilities of legal systems to foster the goals of efficiency and of distributive justice to which we aspire.

D. A Final Observation

One additional observation about entitlements and their components is worth noting: The veto power component or the monetary compensation component of one entitlement can be treated as the in-kind component of a distinct entitlement. Consider stock options, for instance. As was observed earlier,¹⁵³ what is purchased when one buys a call is the veto power component of the other party's entitlement to the underlying stock. In the context of the purchase of that veto power component, the veto power component is the thing transferred and is treated as the in-kind component of a distinct entitlement. To illustrate, let us say that you hold the veto power component of your entitlement to your stock and that I want to buy that veto power component. Can you require payment in return for relinquishing to me the veto power over the stock? Yes,

¹⁵³ See *supra* notes 75-76 and accompanying text.

assuming that you hold the monetary compensation component of an entitlement the in-kind component of which is your veto power. In the context of my purchasing your veto power from you, the veto power component of the entitlement to the stock is now called a "stock option" and is, as such, now treated as the *in-kind* component of a distinct entitlement to a stock option. Do you have to sell the stock option to me? That depends on whether you hold a veto power component of the entitlement to the stock option. If the stock-option entitlement is constructed as a Property rule, then I will buy the stock option and you will sell it only if we both agree. If, alternatively, your entitlement to that stock option is constructed as a Liability rule (perhaps my employment contract with you entitles me to purchase stock options from you, my employer), then I may force a compensated transfer of the stock option. Thus, the veto power component of one entitlement may be treated as the in-kind component of a distinct entitlement which may, in turn, be constructed as any entitlement form.

A monetary compensation component too can be treated as the in-kind component of a distinct entitlement. To create a Transferred Claim rule, for instance, Party *A* would sell the monetary compensation component of her entitlement to freedom from tortious injury to Party *B*. Party *B* would purchase Party *A*'s "claim." Does Party *A* have to sell? May she demand monetary compensation? That depends upon who holds the veto power and monetary compensation components of the entitlement the in-kind component of which is Party *A*'s "claim." The monetary compensation component of Party *A*'s entitlement to freedom from tortious injury is now called a "claim" and is now treated as the in-kind component of a distinct entitlement to the claim.

Thus, a wide range of things including claims (monetary compensation components) and options (veto power components) can constitute the in-kind components of entitlements. Whatever the content of that in-kind component, the posture of the other three components (initiation choice, veto power, and monetary compensation) defines the form of the entitlement constructed.

Efficiency and distributive consequences flow from both the initial allocation of the in-kind component and the form of entitlement constructed—that is, the allocation of the other three entitlement components. As has been discussed, different combinations of the four entitlement components have different efficiency and distributive characteristics. Understanding the available forms of entitlement, and the characteristics of each, will contribute to effective legal design and legal decisionmaking. Courts, legislatures, and other legal decisionmakers, equipped with a comprehensive view of

the possible entitlement forms and their implications, would be enabled to reason more precisely and to act more efficaciously in the pursuit of the goals of efficiency and of justice.

CONCLUSION

The ambition of this Article has been to contribute to an understanding of the structure and substance of legal entitlements. To that end, this Article has identified four components from which entitlements are constructed. This four-component model is not the only valid approach to analyzing entitlements. Rather, it is one perspective—and, it is hoped, a useful one—on the subject.

W.N. Hohfeld, working early in this century, also developed what may be characterized as a component-based approach to analyzing the structure of entitlements. I have argued that the Hohfeldian framework is less useful in certain ways than it might have been and that the four-component framework offered in the present Article represents a preferable component-based framework.

While Hohfeld attempted to identify the fundamental components of legal entitlements, he did not undertake to identify the entitlement forms that could be constructed from those components. Calabresi and Melamed, by contrast, identified three entitlement forms and presented a cogent analysis of the efficiency and distributive implications of each. Calabresi and Melamed did not, however, undertake to analyze the substance and structure—the components—of entitlement forms. The present Article has argued that, when the four components of entitlements are identified and the possible component combinations considered, not three but fourteen coherent forms of entitlement emerge.

Because each of the fourteen entitlement forms has distinct efficiency and distributive characteristics, each will be a more desirable or less desirable form for any given context. Recognizing the available array of entitlement forms is crucial if legal decisionmakers are to have access to the full range of tools available for achieving our efficiency and distributive goals—including our goals of social justice.¹⁵⁴ Understanding the range of entitlement forms, its underlying structure, and the characteristics and implications of each form will permit the greatest possible flexibility and precision in the analysis, specification, and construction of legal entitlements.

This Article's four-component model and its analysis of the efficiency and distributive characteristics of the fourteen basic entitle-

¹⁵⁴ See *supra* note 61 (defining efficiency and distributive considerations to include considerations of justice).

ment forms will be valuable for legal analyses not only in areas, such as property, that have traditionally been conceptualized in terms of "bundles of rights," but also in areas that have not customarily been conceptualized in that way. For example, as was discussed above, new and potentially beneficial options for structuring child custody law arise when the Combined Uncompensated Transfer and Market Inalienability Without Refusal entitlement form is considered.¹⁵⁵

Moreover, the applicability of the ideas here presented is not limited to the realm of private law.¹⁵⁶ Employment discrimination law, for instance, may benefit from a consideration of the full range of entitlement forms. Entitlements against employment discrimination have traditionally been viewed exclusively as fully inalienable. One may not sell nor give away one's equal employment entitlements. That sole focus on full inalienability in equal employment law is most appropriate where the discriminatory acts in question are motivated by stereotyping or animus. But what of "rational discrimination"—differential treatment motivated not, directly or indirectly, by animus, but instead by, say, a profit motive? In such circumstances, where equal employment goals conflict with other *legitimate* goals, consideration of entitlement forms other than full inalienability may prove most valuable.

Consideration of entitlement forms other than full inalienability raises new options for handling complex employment discrimination issues such as fetal protection. Fetal protection recently arose as an equal employment issue when some employers sought to exclude all fertile women from jobs involving exposure to substances harmful to fetuses. Such occupational exposure, the employers contended, is unavoidable given currently available technology.¹⁵⁷

In *International Union, UAW v. Johnson Controls, Inc.*,¹⁵⁸ the Supreme Court held that Title VII of the Civil Rights Act of 1964 prohibits female-exclusionary fetal protection policies.¹⁵⁹ But, as mentioned earlier,¹⁶⁰ the *Johnson Controls* decision has not fully satisfied any camp.¹⁶¹ Many feminists have criticized the decision, ob-

¹⁵⁵ See *supra* note 125, at 467-469 (discussing transfers of child custody between custodians and government).

¹⁵⁶ See *supra* note 64 and accompanying text (noting the applicability of the framework here presented to both private and public law contexts).

¹⁵⁷ Because fetal harm could result from substance exposures occurring before a woman knows she is pregnant, excluding only *pregnant* workers from the jobs at issue would not provide adequate fetal protection, the employers have argued. Hence, the employers have instituted policies excluding all fertile women.

¹⁵⁸ 111 S. Ct. 1196 (1991).

¹⁵⁹ *Id.* at 1209-10.

¹⁶⁰ See *supra* text accompanying note 16.

¹⁶¹ See *supra* note 16 and accompanying text. The "losers" (the defendants and other employers with female-exclusionary fetal protection policies) may actually be the

jecting that, while the decision is more favorable to women than a holding for the defendants would have been, *Johnson Controls* still leaves women with the burden of fetal protection; it is still women who must either self-exclude from fetal-hazardous jobs, or constrain their reproductive lives in accordance with job conditions, or else risk fetal harm and resulting congenital disabilities in their children.¹⁶²

The fetal protection debate has consisted, essentially, of two polar positions: first, that female-exclusionary fetal protection policies violate women's equal employment entitlements and therefore must be enjoined, and second, that such policies do not violate women's equal employment entitlements and so must be permitted. The bipolar nature of the debate has reflected an underlying assumption that equal employment entitlements must necessarily be constructed as fully inalienable, that is, that women may not transfer their equal employment entitlements.

But a consideration of the available entitlement forms yields alternative approaches to the fetal protection problem. The possibility of constructing women's equal employment entitlements in the fetal protection context as entitlement forms *other* than full inalienability offers potential efficiency and distributive benefits.¹⁶³ For example, if women's equal employment entitlements in the fetal protection context were constructed as Property-rule entitlements, then employers might purchase agreements from female employees to forbear from reproduction during a designated period. Such purchases would be voluntary transactions at negotiated prices. Under such an arrangement, female workers could agree—in exchange for compensation—not to give birth during some specified period.¹⁶⁴ This sort of a scheme would address the problems of fetal risk¹⁶⁵ without leaving the full burden of fetal protection on wo-

parties best served by the decision since the majority opinion broadly hints that the *Johnson Controls* decision itself may insulate employers from future tort liability for fetal injuries resulting from substance exposure. The opinion states: "If, under general tort principles, Title VII bans sex-specific fetal-protection policies, the employer fully informs the woman of the risk, and the employer has not acted negligently, the basis for holding an employer liable seems remote at best." 111 S. Ct. at 1208.

¹⁶² See, e.g., Rosen, *supra* note 16.

¹⁶³ Again, efficiency and distributive considerations are defined broadly in this Article to include justice considerations. See *supra* note 61.

¹⁶⁴ The specified period could be, perhaps, the duration of employment or could, alternatively, be limited to times in which high levels of the offending substance had been detected in the woman's blood stream.

¹⁶⁵ An employer presumably would institute a compensated-transfer fetal protection program if the fetal risk level in the workplace were sufficient to warrant the cost of compensation to female employees. A compensated-transfer program would *not* be instituted, presumably, if the fetal risk level—as measured by the employer, in moral and/or tort liability terms—did not warrant the purchase price for protection.

men. At the same time, requiring employers to bear the costs of workplace fetal protection would provide incentives for technological and other development to provide for future workplaces free from fetal hazards.

Of course, using a Property rule in this context might give rise to transaction-cost problems. If employers were permitted to employ only women who charged attractive prices for the in-kind components of their equal employment entitlements (i.e., their entitlements to submit to no greater reproductive limitations than male employees), then competition for employment might drive down the price of women's in-kind components to zero (an outcome that some would favor as efficient and others would object to on efficiency and/or distributive grounds). If, on the other hand, employers were prohibited from firing (or not hiring) women who "charge too much" for the in-kind components of their equal employment entitlements, then women could "hold up" employers for sums exceeding the actual value to the women of their in-kind components.

If such transaction-cost problems rendered use of Property rules undesirable in the fetal protection context, then Liability, Reverse Liability, and Combined Liability and Reverse Liability rules could be considered. Such rules would allow employers (under a Liability rule) or women (under a Reverse Liability rule) or both (under a Combined rule) to force transfer of the in-kind component at a collectively set price. Under a Liability rule, female workers would be required to transfer the in-kind components of their equal-reproductive-freedom-in-employment entitlements to employers as a condition of employment. Such use of a Liability rule would preclude "hold ups" of the employer by pre-determining the sale price (but would also, of course, reduce women workers' autonomy, since effectuating a compensated transfer of equal reproductive freedom would be a condition of employment). Under a Reverse Liability rule, employers would be required to purchase in-kind entitlements to equal reproductive freedom in employment at the pre-set price from women electing to force a transfer. Use of a Reverse Liability rule would help to avoid a bidding down of the price of the in-kind components. A Combined Liability and Reverse Liability rule would render the benefits afforded by both the Liability and the Reverse Liability rules (but would, like the Liability rule, also limit women's autonomy).

If even rare breaches of duties of fetal protection were considered unacceptable, or if such breaches were difficult to detect or to prove, then a Mandatory Transfer rule might be considered. Under the Mandatory Transfer rule, employers would be required to buy,

and women workers required to sell, the in-kind component of the women's entitlement to equal reproductive freedom in employment. The amount of compensation for the transfer would be pre-set. This approach, while providing the greatest guarantee of fetal protection, would do so at the price of limiting women's and employers' flexibility and autonomy.

Any of the entitlement forms here considered could be modified by a no-gift/minimum-price constraint¹⁶⁶ if it were feared that underpricing of the in-kind component might result from allowing price negotiations to occur in the shadow of the collectively-set price. It should also be noted that successful use of any of the rules here considered would require that employers be prohibited (in practice as well as in theory) from refusing to employ women because of fetal protection costs.

Use of a Property, Liability, Reverse Liability, Combined Liability and Reverse Liability, or Mandatory Transfer rule in the fetal protection context would allow for compensated transfers of the in-kind components of women's entitlements to equal reproductive freedom in employment. Permitting such compensated transfers would enable us to reduce fetal harm without placing the costs of doing so on women. Moreover, compensated transfer arrangements would create desirable incentives for employers to develop fetal-safe workplaces.

Thus, efficiency and distributive goals might be better achieved in the fetal protection context by considering a range of possible entitlement forms rather than limiting our thinking to allow only for Full Inalienability rules in equal employment law. This is not to say that these alternative entitlement forms offer a fetal-protection panacea. Indeed, application of any of the rules here considered would give rise to a panoply of practical and theoretical complexities (to be more fully explored in a forthcoming Article).¹⁶⁷ What the consideration of a range of entitlement forms *does* offer in the fetal protection context is options: previously unseen and unconsidered approaches to the problem of fetal protection are revealed once a range of entitlement forms is considered.

Broader ranges of options are also revealed in the affirmative action context when possible entitlement forms beyond full inalienability are explored. Some courts have applied Liability rules to provide compensation to individuals "dispreferred" on the basis of

¹⁶⁶ See *supra* note 108 (stating that no-gift/minimum-price constraints prohibit the gift of the in-kind component or its sale at any price lower than the collectively-set minimum price).

¹⁶⁷ The complexities involved would, of course, include the moral and political issues fundamental to questions of reproductive control.

race under employers' remedial affirmative action policies.¹⁶⁸ Consideration of additional entitlement forms would offer even further options in that context.

In these equal employment areas, considering a broad range of entitlement forms, rather than being limited to the traditional conception of equal employment entitlements as exclusively fully inalienable, holds the promise of leading to more desirable and more just results. Such a broadened exploration offers potential benefits in areas in which innovative ideas are very much needed.

Not only equal employment law, but many areas of law not traditionally conceptualized in "entitlement" terms may benefit from the approach presented in the present Article. The four-component model with its fourteen entitlement forms may offer opportunities for new conceptualizations and approaches to legal problems in diverse areas of the law. It is hoped that the present Article may make some contribution to the breadth of options for analyzing and for resolving a full spectrum of legal problems.

¹⁶⁸ See, e.g., *McAleer v. AT&T*, 416 F. Supp. 435 (D.D.C. 1976) (ordering compensation to a dispreferred); *Patterson v. American Tobacco Co.*, 8 Fair Empl. Prac. Cas. (BNA) 778 (E.D. Va. 1974) (requiring wage protection for dispreferreds), *rev'd on other grounds*, 535 F.2d 257 (4th Cir.), *cert. denied*, 429 U.S. 920 (1976). Such use of Liability rules is singularly appropriate in cases where affirmative action plans are used to remedy the employer's past intentional discrimination. In such cases, the value and justice of having the at-fault employer bear the costs of the remedy rather than being permitted simply to pass those costs on to dispreferred employees is most clear.

Regarding the potential benefits of using Liability rules in the affirmative action context, see J. Hoult Verkerke, Note, *Compensating Victims of Preferential Employment Discrimination Remedies*, 98 YALE L.J. 1479, 1498-99 (1989) ("It would be difficult to frame an argument for the proposition that incumbent employees should bear remedial costs rather than customers, shareholders, or managers.").